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No. 06-

IN THE

Supreme Court of the United States

BONNIE WITTENBURG,

Petitioner,

v.

AMERICAN EXPRESS FINANCIAL ADVISORS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether in responding to a summary judgment motion an employment discrimination plaintiff actually must prove pretext by a preponderance of the evidence in order to receive a trial, or must a plaintiff simply produce evidence from which a reasonable juror could infer pretext in order to survive summary judgment?

2. Whether in responding to a summary judgment motion an employment discrimination plaintiff necessarily must establish a causal connection between discriminatory statements made by the employer and the adverse employment action at issue in order for those statements to be considered relevant evidence of discrimination?

3. Whether a trial court ruling upon a summary judgment motion in an employment discrimination case simply can view and dispose of each piece of evidence individually and in isolation, or must a court base its decision upon the totality of the evidence under the *McDonnell Douglas* burden-shifting framework?

4. Whether a court is permitted to draw an inference of age discrimination when a terminated plaintiff has duties assumed by a person within the protected class who is six years younger?

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Johnson v. Kroger Co., 319 F.3d 858 (6th Cir. 2003) 20

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Kulumani v. Blue Cross Blue Shield Ass'n, 224 F.3d 681 (7th Cir. 2000) 23

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Cited Authorities

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O'Connor v. Consolidated Coin Caterers Corporation, 517 U.S. 308 (1996) 8, 28

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Cited Authorities

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OTHER AUTHORITIES:

Berger, Vivian, et al., Summary Judgment Benchmarks for Settling Employment Discrimination Lawsuits, 23 HOFSTRA LAB. & EMPL. L. J. 45 (2006) 9

Galanter, Marc, The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts, J. EMP. LEG. STUDIES, Vol. 1, No. 3 (Nov. 2004) 9

Lanctot, Catherine J., Secrets and Lies: The Need for a Definitive Rule of Law in Pretext Cases, 61 LA. L. REV. 539 (2001) 10

McCormick, Marcia L., The Allure and Danger of Practicing Law as Taxonomy, 58 ARK. L. REV. 159 (2005) 24

Mecham, Leonidas R., Annual Report of the Director, 2005 JUD. BUS. 129 8

Miller, Arthur M., The Pretrial Rush to Judgment, 78 N.Y.U. L. REV. 982 (2003) 23

Mollica, Paul M., Federal Summary Judgment at High Tide, 84 MARQ. L. REV. 141 (2000) 9-10

Cited Authorities

Page

Ryan, James G., Recent Summary-Judgment Rulings by the Eighth Circuit Court of Appeals and the U.S. District Court of Minnesota ¶ 12 (2001 Upper Midwest Employment Law Handbook) 9

Shapiro, Carolyn, The Limits of the Olympian Court: Common Law Judging Versus Error Correction in the Supreme Court, 63 WASH. & LEE L. REV. 271 (2006) 9, 10

Zimmer, Michael J., Slicing & Dicing of Individual Disparate Treatment Law, 61 LA. L. REV. 577 (2001) 9

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CITATIONS TO OPINIONS

The September 28, 2006 opinion of the United States Court of Appeals for the Eighth Circuit is reported at *Wittenburg v. American Express Financial Advisors, Inc.*, 464 F.3d 831 (8th Cir. 2006). The Eighth Circuit affirmed the decision of the United States District Court for the District of Minnesota unofficially reported at *Wittenburg v. American Express Financial Advisors, Inc.*, No. 04-922, 2005 WL 3047785 (D. Minn. Sept. 19, 2005).

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). On September 28, 2006, the Eighth Circuit affirmed a District Court order granting the motion for summary judgment of Respondent American Express Financial Advisors, Inc. ("AEFA") and dismissed with prejudice the Amended Complaint of Petitioner Bonnie Wittenburg ("Wittenburg"). *See* Appendix ("App.") A. Wittenburg timely filed a petition for rehearing requesting rehearing and/or rehearing *en banc*. That petition was denied by the Eighth Circuit on November 16, 2006. *See* App. C.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Wittenburg maintains that the Court of Appeals erred in dismissing pursuant to a motion for summary judgment under Federal Rule of Civil Procedure 56 her claims for age discrimination under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 *et seq.* ("ADEA"), and for gender discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* ("Title VII").

STATEMENT OF THE CASE

Wittenburg was hired by AEFA in 1998 as a stock analyst to work in the Technology Sector of the Equity Investment Department ("Department" or "EID"). At the time, she became only the second female analyst in a Department of 26 analysts. Wittenburg's performance was outstanding. According to her supervisors, Wittenburg worked hard, displayed "excellent

investment skills," and provided "first class service" to the investment portfolio managers whom she serviced. In 2000, Wittenburg was named "Analyst of the Year."

In the Fall of 2001, AEFA hired a new Chief Investment Officer to oversee the EID, Ted Truscott. Truscott was 40 years old. In turn, Truscott promoted an analyst named Tom Mahowald, 37, to Director of Research. In this capacity, Mahowald supervised all of the analysts including Wittenburg.

In early 2002, Truscott and his new management team initiated "a two year make-over plan" to reorganize the EID that included three reductions-in-force. The first occurred in February 2002 and resulted in the termination of several portfolio managers. The second, in June 2002, resulted in the termination of three analysts. The third and final reduction-in-force occurred in November 2003 and resulted in the termination of seven analysts including Wittenburg. Wittenburg maintains that the AEFA make-over plan unfairly targeted older employees like herself and favored younger individuals, that Mahowald was biased in favor of younger males and evaluated her performance in a discriminatory fashion, and that AEFA's reliance on Mahowald's discriminatory evaluation to justify her termination was a pretext for discrimination.

As part of the make-over, AEFA terminated 6 of the 8 oldest analysts in the EID, including Roger Lund, 61, Lawrence O'Connell, 61, Dan Donovan, 58, Thomas Medcalf, 56, Raymond Hirsch, 55, and Wittenburg, 51. Analysts Curtiss Weaver, 58, and Michael Garbish, 51, resigned their positions. Thus, the make-over resulted in the removal of the 8 oldest analysts in the Department.

Statements by Truscott and other AEFA leaders reflected a managerial attitude favoring younger employees. In February 2002, immediately prior to the first force reduction, Truscott stated that "we are not averse to hiring *younger* portfolio managers and analysts and growing them." (Emphasis added). Within days of that statement, Truscott, Human Resources Representative Judy Forker ("Forker"), and Head of Equities

Dan Rivera ("Rivera"), met with Alfred Henderson ("Henderson"), a 62 year-old portfolio manager, and informed him that he was being terminated. Later that day, Rivera explained to Henderson that his discharge was "part of a decision to retain those that were *younger* as *younger* employees have more years of service ahead of them."[1] (Emphasis added).

In preparation for the second reduction-in-force, Mahowald and Rivera created a chart of the 26 EID analysts, whom they rated as "keep," "maybe keep," "maybe," "maybe drop," or "drop." The three women including Wittenburg were rated as "maybe drop," the only analysts to receive this designation. Mahowald and Rivera rated as "keep" five younger male analysts whose overall performance ratings were in fact lower than or the same as Wittenburg's. Those analysts with lower scores were 26, 27, 32, and 38 years old. The fifth, 41, had the same overall rating as Wittenburg.

About that same time, Forker indicated that management wanted to add an analyst to the EID, namely, a "*jr. person*," as part of the reorganization. Within weeks of the second reduction in which three analysts were fired, including Larry O'Connell, 61, and Raymond Hirsch, 55, Mahowald hired Blair Brumley, 39, despite reports about his poor performance in the industry and lack of knowledge. Subsequently, Mahowald justified his decision because Brumley had been unemployed for 10 months and had a family to support. This was not the first or last time that Mahowald expressed support for younger male "breadwinners." In 1999, while still an analyst, he had a discussion with a female analyst named Kay Doremus who raised concerns that she was going to be fired by AEFA. Mahowald responded that she had to "make concessions" because "a lot of these guys [male analysts] are the sole support for their families."

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[1] Henderson filed a charge of age discrimination against AEFA with the Equal Employment Opportunity Commission that eventually led to a settlement agreement between the parties.

In 2002, Wittenburg continued to provide excellent service to the portfolio managers. In September, Mahowald described her stock performance ratings to date as "very, very good." In the Fall of 2002, Mahowald told all the analysts that their "number one priority" for the remainder of the year was to evaluate unrated stocks. Wittenburg was the only analyst to complete this assignment.

In February 2003, Mahowald met with Wittenburg to discuss her 2002 performance evaluation.[2] This was the first time that Mahowald had evaluated her. Shortly after his promotion to Director of Research, Mahowald had circled the word "integrity" on a corporate memo describing the performance evaluation process and wrote, "what bullsh-t." To Wittenburg's surprise, Mahowald gave her a G/4 rating for 2002 stock analysis and an L/3 score for her leadership. When Wittenburg told Mahowald that she did not agree with the G/4 rating, Mahowald told her that her written evaluation was not yet complete and that he would provide it "in the near future," but he never did.

Throughout 2003, Wittenburg protested the G/4 rating to Mahowald. In June, AEFA provided Wittenburg with a rating of her 2002 stock evaluation performance from an outside consultant to AEFA known as Starmine Monitor ("Starmine"). Starmine gave Wittenburg's 2002 performance four out of five stars, a high rating equivalent to a G/2.[3] When Wittenburg

[2] At AEFA, analysts like Wittenburg are evaluated in two broad and equally weighed categories. The first category, known as a Goal or "G" score, rates the employee's stock evaluation performance over the course of a year. The second category, known as an "L" score, rates the employee's "leadership" performance. AEFA concedes the "L" score is highly subjective. For "G" and "L" scores, analysts are scored on a scale of 1 to 5, with 1 being the highest rating. A "3" rating, which is the most common, means "achieved expectations in all areas," while a "4" means "achieved expectations in many, but not all areas," and is considered unsatisfactory.

[3] AEFA provided Starmine the same data it had considered to arrive at Wittenburg's G/4 rating.

learned of the Starmine score, she told Mahowald, "here is more indication that the G/4 doesn't make sense." Mahowald *agreed* with her, but nevertheless failed to change the G/4 rating to accurately reflect her performance. In September 2003, Wittenburg again protested her G/4 rating to Mahowald. He told her not to worry about the G/4, that her numbers in 2003 were "very good," and that everyone was "happy" with her performance.

At this time, Truscott and his management team prepared for the third and final reduction-in-force. Contrary to prior practice, they decided to eliminate analysts by sector as opposed to picking from the entire pool. AEFA claimed it wanted to retain analysts based on their specific areas of expertise. Also contrary to prior practice, Truscott and his management team chose to eliminate analysts based on their performance not over a number of years but rather as rated in a single year, namely, 2002. This about-face was contrary to a recent memo from Truscott who had stressed the importance of measuring performance over a number of years.

Truscott and Mahowald decided to eliminate 3 out of the 4 analyst positions in the Technology Sector. Upon learning of the upcoming reduction-in-force, portfolio manager Mike Kennedy specifically requested that management keep Wittenburg because she had done a good job for him. AEFA claims that it compared the 2002 performance ratings of all 4 analysts in the Technology Sector and decided to terminate Wittenburg because her G/4 and L/3 scores were not the best in the group.

On November 18, 2003, Truscott informed Wittenburg that she had been terminated. Wittenburg vehemently disputed the accuracy of the G/4 score and insisted that her performance justified a much better rating. In response, Truscott mentioned the analysts' failure to evaluate the unrated stocks assigned to them, Mahowald's so-called "number one priority." Wittenburg, however, was the only analyst in the EID to complete that assignment. Immediately following Wittenburg's termination

meeting, Mahowald went to see Wittenburg in her office. During that brief encounter, Mahowald stated, "Your husband has a job, doesn't he?"

AEFA kept a younger male analyst in the Technology Sector, Dean Ramos, 40. For his performance in 2002, Mahowald had rated Ramos a satisfactory G/3 for stock evaluation and a very high L/1 for leadership. Undisclosed to Wittenburg was the fact that Mahowald had handed out higher "L/1" ratings to two younger male analysts in the Technology Sector, namely, Ramos and Kurt Lauber, 35. Mahowald later claimed that he had awarded Ramos and Lauber higher L ratings because the two had completed certain "special projects" assigned to them. Mahowald never assigned or offered to assign any "special projects" to Wittenburg. Unlike Wittenburg, neither Ramos nor Lauber had completed Mahowald's "number one priority" of evaluating unrated stocks, yet she received no credit for this accomplishment in her evaluation scores, and the two men received no demerit in theirs.

Following Wittenburg's termination, AEFA assigned her duties to Ramos, 40, and a younger male Industrial Sector analyst named Steve Roorda. (Roorda "[w]ill work closely with Dean Ramos on other technology-related coverage"). Roorda was 45 years old. AEFA also advertised for two new analyst positions in its Minneapolis office. In contrast to its stated preference for specific Sector expertise in justifying the November 2003 reduction-in-force, AEFA sought candidates to perform analysis within "multiple assigned sectors" covering "a combination of insurance, mortgage-related, technology and consumer industries."

During Wittenburg's tenure (1998-2003), females did not fare well in the Department. Few women were hired and fewer were promoted. In addition, the few female analysts either were terminated (Wittenburg), resigned (Kay Doremus, Maureen Pettirossi), transferred to a lesser position, or failed to receive a pay raise owed to them (Sandy Hollenhorst).

Following administrative exhaustion, Wittenburg filed suit in the District Court of Minnesota asserting that she was terminated by AEFA because of her age, then 51, in violation of the ADEA, and/or her sex, female, in violation of Title VII.[4] The District Court granted AEFA's motion for summary judgment and dismissed Wittenburg's complaint with prejudice. On appeal, the Eighth Circuit affirmed by opinion dated September 28, 2006.

The Eighth Circuit analyzed Wittenburg's discrimination claims under the *McDonnell Douglas* burden-shifting framework for circumstantial evidence cases of discrimination. The Court of Appeals assumed without discussion that Wittenburg had set forth a *prima facie* case of both age and sex discrimination. Thereafter, the Court found that AEFA had produced evidence of a non-discriminatory reason for Wittenburg's termination. The Court's analysis then turned to the final step of the *McDonnell Douglas* burden-shifting framework – pretext. The Court held that Wittenburg had failed **"to prove pretext"** in her age and sex discrimination claims and, therefore, affirmed the dismissal of those claims on summary judgment. In particular, the Court stated that "Wittenburg has failed to prove pretext in her age discrimination claim" and found that she had failed to meet her burden of proving that AEFA's proffered reason for her termination was a pretext for gender discrimination.

In evaluating Wittenburg's evidence of discriminatory statements, the Eighth Circuit applied a relevancy standard, sometimes referred to as the "stray remarks" doctrine, that required Wittenburg to establish a **"causal connection"** between her November 2003 termination and any discriminatory statement made by the employer. The Court of Appeals applied this standard to dismiss the discriminatory statements of Truscott, Rivera, and Forker because they purportedly lacked a

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[4] Wittenburg brought companion age and sex discrimination claims pursuant to Minnesota's Human Rights Act, MINN. STAT. §§ 363A.01 – .41.

causal connection to Wittenburg's termination. Similarly, the Court applied this standard to reject Mahowald's three statements reflecting his discriminatory bias because they also allegedly lacked a causal connection to Wittenburg's termination.

In addressing Wittenburg's evidence of pretext and discrimination, the Eighth Circuit **failed to review the entire record**. In particular, the Circuit Court reviewed each piece of evidence individually and in isolation without reference to other favorable evidence. Moreover, the Court ignored several pieces of evidence favorable to Wittenburg, and failed to draw all reasonable inferences in her favor as the nonmoving party.

Also, the Court of Appeals refused to permit an inference of age discrimination from the fact that Wittenburg's duties were assumed by two younger employees, in particular, Ramos, 40, and Roorda, 45. The Eighth Circuit stated that in order to permit an inference of age discrimination, the employee assuming her duties had to be **"substantially younger,"** citing *O'Connor v. Consolidated Coin Caterers Corporation*, 517 U.S. 308, 313 (1996). The Court of Appeals held as a matter of law that because Roorda was six years younger than Wittenburg he was not "substantially younger" to allow an inference of age discrimination.

In response to the Eighth Circuit's September 28, 2006 decision, Wittenburg timely filed a petition for rehearing. The Eighth Circuit denied that petition on November 16, 2006.

REASONS FOR GRANTING THE PETITION

Employment discrimination claims now make up a large percentage of the cases filed in federal court.[5] Unfortunately for plaintiffs, district courts grant summary judgment significantly more often in employment discrimination cases

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[5] *See* Leonidas R. Mecham, *Annual Report of the Director*, 2005 Jud. Bus. 129 tbl.C-2A, available at *http://www.uscourts.gov/judbus2005/appendices/c2a.pdf* (between 2001 and 2005, 7.5% of all cases filed in federal court were employment discrimination cases).

than in other types of cases,[6] with the percentage of motions granted in some districts approaching or exceeding 70%.[7] Several commentators have denounced the misuse of summary judgment in employment discrimination cases because those cases often turn on highly fact-intensive issues of motive, intent, and credibility which are better left for a trier of fact.[8] Moreover,

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[6] *See* Marc Galanter, The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts, J. EMP. LEG. STUDIES, Vol. 1, No. 3 (Nov. 2004) at 11 & n.14 (remarking on the "readiness" of courts to grant summary judgment in civil rights cases).

[7] According to published decisions, the district courts in the Second Circuit granted summary judgment in favor of the employer **69.1%** of the time during the 2000-2001 time frame. Vivian Berger, et al., Summary Judgment Benchmarks for Settling Employment Discrimination Lawsuits, 23 HOFSTRA LAB. & EMPL. L. J., 45, 55 (2006). From 1995 to 2003, the Northern District of Illinois granted summary judgment in the defendant's favor more than **72%** of the time. Carolyn Shapiro, The Limits of the Olympian Court: Common Law Judging Versus Error Correction in the Supreme Court, 63 WASH. & LEE L. REV. 271, 306 (2006). According to available opinions, from 1990 through April 2001, the District Court in Minnesota granted summary judgment in favor of the employer in **70.4%** of all discrimination claims; this figure rises to **79%** when partial grants of summary judgment are included. James G. Ryan, Recent Summary-Judgment Rulings by the Eighth Circuit Court of Appeals and the U.S. District Court of Minnesota ¶12 (2001 Upper Midwest Employment Law Handbook). Of the 21 known summary judgment motions in employment discrimination cases ruled upon by the trial judge below prior to *Wittenburg*, the Hon. Joan N. Ericksen granted total summary judgment to the defendant in 20 cases, and partial summary judgment in 1 case.

[8] *See e.g.*, *Melvin v. Car-Freshener Corp.*, 453 F.3d 1000, 1003-04 (8th Cir. 2006) (Sr. J. Donald Lay in dissent) ("Too many courts in this circuit, both district and appellate, are utilizing summary judgment in cases where issues of fact remain. This is especially true in cases where witness credibility will be determinative. In these instances, a jury, not the courts, should ultimately decide whether the plaintiff has proven her case."); Michael J. Zimmer, Slicing & Dicing of Individual Disparate Treatment Law, 61 LA. L. REV. 577, 592-603 (2001) (describing the misuse of summary judgment despite *Reeves*); Paul W. Mollica,

(Cont'd)

commentators have found this area of law to be "chaotic" and "often arbitrary" in which some judges are willing to grant summary judgment in cases that other judges would find worthy of a trial.[9] This Court should grant Wittenburg's petition for a writ of certiorari to provide much needed guidance in this uncertain area of the law, to resolve Circuit splits on several issues in the employment discrimination context, and to clarify this Court's proper standard for analyzing employment discrimination cases at the summary judgment stage under the *McDonnell Douglas* burden-shifting paradigm.

I. Review Is Warranted To Resolve A Conflict Regarding A Plaintiff's Burden On Summary Judgment With Respect to Pretext

The Circuit Courts are divided regarding a plaintiff's burden with respect to "pretext" at the summary judgment stage. The Eighth and Sixth Circuits actually require a plaintiff to prove pretext by a preponderance of the evidence in order to survive summary judgment. In contrast, the Third and Eleventh Circuits require a plaintiff to produce evidence from which a reasonable juror could infer pretext in order to avoid summary judgment. Wittenburg submits that the Eighth Circuit's standard erroneously confuses a plaintiff's ultimate burden at trial with a plaintiff's burden at summary judgment.

(Cont'd)

Federal Summary Judgment at High Tide, 84 MARQ. L. REV. 141, 168-70 (2000) (noting examples of misuse of summary judgment in employment discrimination cases).

[9] Shapiro, 63 WASH. & LEE L. REV. at 301; Marcia L. McCormick, The Allure and Danger of Practicing Law as Taxonomy, 58 ARK. L. REV. 159 (2005) (arguing that in applying the summary judgment tests in employment discrimination cases, courts have lost sight of the law); Catherine J. Lanctot, Secrets and Lies: The Need for a Definitive Rule of Law in Pretext Cases, 61 LA. L. REV. 539, 540-61 (2001) (noting continued confusion in the lower courts over the method of proof due to the Supreme Court's lack of guidance in pretext cases).

A. The Eighth Circuit Conflicts With Other Circuits In Holding That A Plaintiff Must Prove Pretext By A Preponderance Of The Evidence In Order To Avoid Summary Judgment

There is a split among the Circuit Courts regarding a plaintiff's burden on summary judgment with respect to pretext. The Eighth Circuit, along with the Sixth Circuit, require a plaintiff to prove pretext by a preponderance of the evidence in order to survive summary judgment. *See e.g.*, *Kohrt v. MidAmerican Energy Co.*, 364 F.3d 894, 897-98 (8th Cir. 2004) ("in order to survive summary judgment, [plaintiff] must 'prove by **a preponderance of the evidence** that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.'"); *Briggs v. Potter*, 463 F.3d 507, 515 (6th Cir. 2006) ("To make a submissible case on the credibility of his employer's explanation, the plaintiff is required to show by **a preponderance of the evidence** either (1) that the proffered reasons had no basis *in fact,* (2) that the proffered reasons did not *actually* motivate [the adverse employment action], or (3) that they were *insufficient* to motivate [the adverse employment action].") (italics in original) (citation omitted).

In contrast, several other Circuits, including the Third and Eleventh Circuits, merely require a plaintiff to produce evidence from which a reasonable juror could infer pretext in order to avoid summary judgment. *See e.g.*, *Tomasso v. Boeing Co.*, 445 F.3d 702, 706 (3d Cir. 2006) ("In order to create a genuine issue of material fact as to whether the proffered reasons are pretextual, Tomasso must 'point to some evidence, direct or circumstantial, from which a factfinder could reasonably'" infer pretext) (quoting *Fuentes v. Perskie*, 32 F.3d 759, 764 (3d Cir. 1994));

Hurlbert v. St. Mary's Health Care System, Inc., 439 F.3d 1286, 1298 (11th Cir. 2006) ("To show pretext, a plaintiff must 'come forward with evidence, including the previously produced evidence establishing the prima facie case, sufficient to permit a reasonable factfinder to conclude that the reasons given by the employer were not the real reasons for the adverse employment decision.'") (quoting *Chapman v. Al Transp.*, 229 F.3d 1012, 1024 (11th Cir. 2000) (en banc)); *Patterson v. County of Oneida, N.Y.*, 375 F.3d 206, 221 (2d Cir. 2004). This Court should grant certiorari to resolve this split among the Circuit Courts.

B. The Eighth Circuit's Requirement That A Plaintiff Prove Pretext At Summary Judgment Erroneously Confuses The Plaintiff's Ultimate Burden At Trial With Her Burden At Summary Judgment

In this case, the Eighth Circuit applied its preponderance of the evidence standard to Wittenburg's evidence of pretext in affirming the District Court's grant of summary in favor of AEFA. In dismissing Wittenburg's age discrimination claim, the Eighth Circuit inventoried Wittenburg's pretext evidence and held that "Wittenburg ha[d] failed to *prove* pretext in her age discrimination claim." (Emphasis added). In dismissing Wittenburg's sex discrimination claim, the Eighth Circuit framed Wittenburg's argument as contending that she in fact had "*proved* that AEFA's proffered reason for her termination was a pretext for gender discrimination." (Emphasis added). The Eighth Circuit rejected Wittenburg's purported argument and held that Wittenburg had failed to prove pretext in her sex discrimination claim. Wittenburg respectfully submits that the "preponderance of the evidence" standard for assessing pretext on summary judgment used by the Eighth Circuit confuses the standards for summary judgment and an employment discrimination plaintiff's burden at trial.

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment should be granted only if "there is no genuine issue as to any material fact and that the moving party

is entitled to a judgment as a matter of law." FED. R. CIV. P. 56. The Supreme Court has pointed out that in response to a properly supported summary judgment motion this rule requires the nonmoving party to respond by submitting evidentiary materials that designate "specific facts showing that there is a genuine issue for trial." *Matushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).[10] Critically, "the issue of material fact required by Rule 56(c) to be present to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury to resolve the parties' differing versions of the truth at trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986) (citation omitted). In other words, "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249.

For the trial of an employment discrimination case such as this one where the plaintiff relies on circumstantial evidence, the three step burden-shifting indirect method of proof set forth in *McDonnell Douglas* applies. In *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981), the Court described "the basic allocation of burdens and order of presentation of proof" prescribed by *McDonnell Douglas* in a disparate treatment case as follows:

> First, the plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving his prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee's rejection.

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[10] This requirement, however, "do[es] not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

> Third, should the defendant carry this burden, the plaintiff must then have the opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Id., 450 U.S. at 252-53 (citations and internal quotations omitted).

In both *McDonnell Douglas* and *Burdine* the issues resolved by the Supreme Court arose in the context of a full bench trial, not on a motion for summary judgment. Thus, the proof paradigm used in those cases describes the burdens required of the parties to prevail at trial, not their burdens at summary judgment, which are instead addressed by the Court's "summary judgment trilogy" of *Matsushita*, *Catrett*, and *Anderson* as described above. Indeed, in *Burdine*, the Court concluded that the burden placed on the plaintiff by the third step of *McDonnell Douglas* "to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination," *Burdine*, 450 U.S. at 253, "now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination." *Id.* at 256. Thus, the preponderance of the evidence standard generally required for plaintiffs to prevail at trial in other civil cases applies to the plaintiff's "ultimate burden" under *McDonnell Douglas*.[11]

In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), the Supreme Court addressed the question of

[11] In *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993), another intentional discrimination case arising from "a full bench trial," *id.* at 505, the issue involved, not the summary judgment standard, but standard of proof at trial, *i.e.*, "whether [under the *McDonnell Douglas* framework] . . . the trier of fact's rejection of the employer's asserted reasons for the [employer's challenged] actions mandates a finding for the plaintiff." *Id.* at 504. The Court held that, rather than *compelling* a finding for plaintiff, "rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of discrimination." *Id.* at 511.

"whether a plaintiff's prima facie case of discrimination combined with sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its decision, is adequate to sustain a finding of liability for intentional discrimination." Clarifying its holding in *Hicks*, the Court in *Reeves* held that "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Id.* at 148.

Pointing out that "the standard for granting summary judgment 'mirrors' the standard for judgment as a matter of law, such that the inquiry under each is the same;"[12] *id.* at 150 (internal quotations and citations omitted), the Court did not purport to change that standard, but addressed the question of "what evidence a court is to consider in ruling on a Rule 50 motion." *Id.* at 149. The Court concluded that:

> in entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record. In doing so, however, the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions not those of a judge.

Id. at 150 (internal quotations and citations omitted). Therefore,

> [w]hether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. Those include the strength of the plaintiff's

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[12] While there is no way to be certain, this phrase and particularly the word "mirrors" may be producing confusion in judges' minds and ultimately among the Circuits about a plaintiff's pretrial evidentiary burden in employment discrimination cases as opposed to in the general run of civil cases controlled solely by the summary judgment trilogy.

> prima facie case,[13] the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case that properly may be considered on a motion for judgment as a matter of law.

Id. at 148-49. *Reeves* clearly established that while the plaintiff's ultimate burden at trial is to prove her case by the preponderance of the evidence, this standard is not applicable to either judgment as a matter of law or summary judgment.

While the trial court must evaluate the evidence in accordance with the *McDonnell Douglas/Burdine/Hicks/Reeves* quartet of cases, the summary judgment standard established by the Court in the *Matsushita/Catrett/Anderson* trilogy remains unchanged. This conclusion is bolstered by the Supreme Court's language in *Anderson*, 477 U.S. at 252, stating thirteen years after *McDonnell Douglas* that on a motion for summary judgment, the trial judge's function is *not* to weigh the evidence and make credibility determinations to decide if the plaintiff has *proved* her case by a preponderance of the evidence, but to determine "whether reasonable jurors *could find* by a preponderance of the evidence that the plaintiff is entitled to a verdict – 'whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it.'" *Id.* (emphasis added).

Wittenburg respectfully submits that the Eighth Circuit's standard misapplies to summary judgment the "preponderance of the evidence" standard which correctly is applied only to "the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff." *Reeves*, 530 U.S. at 143. The preponderance of the evidence standard is emphatically *not* applicable to summary judgment. The Eighth Circuit improperly imposed on Wittenburg the preponderance of the evidence standard applicable to her "ultimate burden" under the *McDonnell Douglas* proof scheme

[13] In the Eighth Circuit, the concession of a prima facie case deprives a plaintiff of the benefit of its strength.

rather than the proper summary judgment standard clarified in *Reeves*. The question at summary judgment is *not* whether the plaintiff proved pretext by a preponderance of the evidence, but whether the evidence presented is sufficient to permit the trier of fact to make such a finding. *Reeves*, 530 U.S. at 148. As the Eighth Circuit's decision in this case demonstrates, a requirement that a plaintiff must satisfy the preponderance of the evidence standard at summary judgment effectively insures that employment discrimination cases based on circumstantial evidence almost never will get to trial.

II. Review Is Necessary To Resolve A Conflict Concerning The Relevance Of Discriminatory Comments Of Non-Decision Makers And Non-Contemporaneous Discriminatory Comments Of Decision Makers

With respect to the stray remarks doctrine, there is a split among the Circuits about whether a plaintiff must establish a causal connection between a discriminatory statement and the decision at issue in order for that statement to be considered relevant evidence of discrimination. Wittenburg respectfully submits that the Eighth Circuit's "causal connection" requirement erroneously discounts the importance of context in employment discrimination cases in derogation of Supreme Court pronouncements and unfairly cripples a plaintiff's ability to circumstantially prove discrimination.

A. The Eighth Circuit Conflicts With Other Circuits In Holding That A Plaintiff Must Establish A Causal Connection Between A Discriminatory Comment And The Decision At Issue In Order For That Comment To Considered Relevant.

The Eighth, Fourth, Fifth, and Tenth Circuits require plaintiffs to establish a causal connection between a discriminatory comment or attitude in the workplace and the adverse employment action at issue in order for that comment or attitude to be considered relevant evidence of discrimination. *See e.g.*, *Wittenburg*, 464 F.3d at 837 (plaintiff "must establish '*some* causal relationship' to show 'the significance of

[decisionmakers'] non-contemporaneous statements or statements made by persons other than the relevant decision-maker, to the resolution of the ultimate issue of intentional discrimination.'"); *Brinkley v. Harbour Recreation Club*, 180 F.3d 598, 608 (4th Cir.1999) ("[T]o prove discriminatory animus, the derogatory remark cannot be stray or isolated and unless the remarks upon which plaintiff relies were related to the employment decision in question, they cannot be evidence of discrimination."); *Shorter v. ICG Holdings, Inc.*, 188 F.3d 1204, 1209-10 (10th Cir.1999) (recognizing that derogatory "comments may serve as circumstantial evidence of discrimination, [but] the plaintiff must still show some nexus between the statements and the defendant's decision to terminate the employee"); *Rubinstein v. Administrators of Tulane Ed. Fund*, 218 F.3d 392, 400-01 (5th Cir. 2000).

In contrast, the Third, Sixth, and Eleventh Circuits do not require plaintiffs to show a specific causal connection between discriminatory comments and the adverse employment action in order to consider those comments as relevant evidence of discrimination. The Third Circuit has recognized that "discriminatory comments by nondecision makers, or statements temporally remote from the decision at issue, may properly be used to build a circumstantial case of discrimination." *Abrams v. Lightolier, Inc.*, 50 F.3d 1204, 1214 (3d Cir. 1995). The Sixth Circuit has noted that "[a]lthough . . . a direct nexus between the allegedly discriminatory remarks and the challenged employment action affects the remark's probative value, the absence of a direct nexus does not necessarily render a discriminatory remark irrelevant." *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 355-56 (6th Cir. 1998). Similarly, the Eleventh Circuit has held that discriminatory comments which are remote in time or not directed at the plaintiff may still contribute to a circumstantial showing of discriminatory intent. *Ross v. Rhodes Furniture, Inc.*, 146 F.3d 1286, 1291 (11th Cir. 1998). This Court should grant certiorari in the instant case to address this split among the Circuit Courts concerning the "stray remarks" doctrine.

B. The Eighth Circuit's Requirement That A Plaintiff Establish A Causal Connection Between A Stray Remark And The Decision At Issue Erroneously Denies The Importance Of Context In Building A Circumstantial Case Of Discrimination.

Wittenburg submits that the "causal connection" requirement should be rejected outright and federal courts should analyze "stray remarks" under the normal relevancy standard set forth in Rule 401 of the Federal Rules of Evidence. As this Court has recognized, "the question facing triers of fact in discrimination cases is both sensitive and difficult," and "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes." *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983). As a result, plaintiffs are encouraged to prove discrimination with circumstantial evidence. *See McDonnell Douglas Corp.*, 411 U.S. at 800-801. Circumstantial evidence is not only a sufficient form of evidence to prove discrimination, "but may also be more certain, satisfying and persuasive than direct evidence." *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003) (quotation omitted).

In analyzing any employment discrimination case, "[c]ontext matters." *Burlington Northern and Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2415 (2006). "The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." *Id.* (quoting *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81-82 (1998)). In *Ash v. Tyson Foods, Inc.*, 126 S. Ct. 1195 (2006), this Court found erroneous a Circuit Court's holding that the term "boy" alone without any racial modifier never could be considered probative of racial bias. *Ash*, 126 S. Ct. at 1195-96. In so finding, this Court stated that while the term "boy" will not always be evidence of racial animus, it did not mean that the term is always benign, and that "[t]he speaker's meaning may depend on

various factors including context, inflection, tone of voice, local custom, and historical usage." *Id.*

The "stray remarks" approach adopted by the Third, Sixth, and Eleventh Circuits, unlike the approach adopted by the Eighth, Fourth, Fifth, and Tenth Circuits, is consistent with these Supreme Court pronouncements. Under that approach, plaintiffs are permitted to use "stray remarks" to show a discriminatory corporate atmosphere or context in which the adverse decision was made. *See Ercegovich*, 154 F.3d at 356-57; *Ryder v. Westinghouse Elec. Corp.*, 128 F.3d 128, 133 (3d Cir. 1997) (stating "a plaintiff may offer circumstantial proof of intentional discrimination on the basis of age in the form of a supervisor's statement relating to formal or informal managerial attitudes held by corporate executives"); *Brewer v. Quaker State Oil Refining Corp.*, 72 F.3d 326, 333 (3d Cir.1995); *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43, 54 (3d Cir.1989). Contextual evidence of a discriminatory corporate atmosphere "in turn may serve as circumstantial evidence of individualized discrimination directed at the plaintiff." *Ercegovich*, 154 F.3d at 356-57; *Vessels v. Atlanta Ind. School Sys.*, 408 F.3d 763, 771 (11th Cir. 2005) (although evidence of racist statements is insufficient for a direct evidence case, "it can be relevant in the circumstantial framework to show that the employer's proffered reasons were pretextual"). Indeed, evidence of a discriminatory corporate atmosphere is "often crucial" to an assessment of pretext as well as the ultimate question of discrimination, particularly "as sophisticated discriminators render their actions increasingly more subtle to circumvent adverse judicial precedent." *Ryder,* 128 F.3d at 133.

Under the approach of the Third, Sixth, and Eleventh Circuits, plaintiffs also can use discriminatory statements by decision makers unrelated to the adverse employment action at issue to show discriminatory bias. *See Abrams v. Lightolier Inc.*, 50 F.3d 1204, 1214 (3d Cir. 1995); *Johnson v. Kroger Co.*, 319 F.3d 858, 868 (6th Cir. 2003); *see also Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097 (2000) (evidence of

age animus included plaintiff's testimony that the decision maker told him that he "was so old [he] must have come over on the Mayflower" and that the plaintiff "was too damn old to do [his] job."); *Roebuck v. Drexel Univ.*, 852 F.2d 715, 733 (3d Cir.1988) (upholding admissibility of discriminatory comment by decision maker made five years before denial of tenure). Evidence that a decision maker harbored a discriminatory bias undoubtedly is relevant to determining whether the adverse employment decision resulted from discriminatory motives. *Id.* Furthermore, in assessing more than one biased remark, these courts do not view each remark in isolation, "but are mindful that the remarks buttress one another as well as any other pretextual evidence supporting an inference of discriminatory animus." *Ercegovich*, 154 F.3d at 356.

In this case, the Eighth Circuit used its "causal connection" standard to erroneously reject Wittenburg's evidence of a discriminatory corporate atmosphere and of Mahowald's discriminatory animus against females. The Court of Appeals rejected Truscott's statement that occurred when AEFA was preparing to reduce employees that it was willing to hire and grow "*younger* portfolio managers and analysts," concluding that it was nothing more than "a generalized statement" that did not evince "a discriminatory policy or practice" nor "establish that age was the basis for Wittenburg's termination."[14] Likewise, the Court rejected Rivera's statement that AEFA had made a decision to retain *younger* workers because they allegedly had more years of service ahead of them merely because Rivera was not a decision maker in Wittenburg's termination (although he was a decision maker in the first of the three RIFs) and his statement "could be characterized as a non-contemporaneous, non-decisionmaker's opinion about company retention policy during a prior RIF." Moreover, the Eighth Circuit rejected Forker's reference that AEFA wanted to

[14] Wittenburg submits that this evidence shows that Truscott did have age on his mind during the "make-over" which, in turn, makes it more likely that Wittenburg was terminated because of her age.

hire a "*jr. person.*" because Wittenburg failed to demonstrate that Forker equated "junior person" to a "younger person," or how such a notation related to her own termination, despite the fact that Wittenburg presented evidence that just three weeks after the second reduction Mahowald hired a 39 year old analyst into the EID. Although the Court did discuss the statements of Truscott, Forker, and Rivera as a group, it never considered their statements in relation to any other favorable evidence and concluded, not surprisingly, that these statements alone "fell short of establishing pretext."

The Court of Appeals addressed each of Mahowald's discriminatory statements individually and found that each one lacked the requisite causal connection to Wittenburg's termination. According to the Court, Mahowald's statement to Doremus that she had to make "concessions" because male analysts were the sole support of their families was not causally connected to Wittenburg's termination because it was made 4 years prior thereto and before Mahowald had become a supervisor. The Court failed to realize that this comment was buttressed by Mahowald's later prejudicial comments. Although the Court did concede that Mahowald's justification for hiring Brumley (unemployed for 10 months and had a family to support) reflected a bias in favor of male breadwinners, it nevertheless concluded that this statement alone could not prove gender discrimination. Similarly, the Court found that Mahowald's statement contemporaneous to Wittenburg's termination, "Your husband has a job, doesn't he," did not prove that AEFA terminated Wittenburg because of her gender "in the absence of other proof." In this case, the Eighth Circuit through its application of the "stray remarks" doctrine unjustly denied Wittenburg the opportunity to prove discrimination with circumstantial evidence of a discriminatory corporate atmosphere and a decision maker's discriminatory bias.

III. Review Is Necessary To Resolve A Conflict Concerning The Proper Review Standard For Analyzing A Plaintiff's Evidence On Summary Judgment

A conflict exists among the Circuits regarding the proper standard for analyzing an employment discrimination case on summary judgment under the *McDonnell Douglas* framework. The Third Circuit finds that a court must view the record as a whole picture and thereafter "determine whether *the totality of the evidence* would allow a reasonable factfinder to conclude that [the plaintiff] has established the alleged bias." *Bray v. Marriott Hotels*, 110 F.3d 986, 991 (3d Cir. 1997) (emphasis in original). According to the Third Circuit: "A play cannot be understood on the basis of some of its scenes but only on its entire performance, and similarly, a discrimination analysis must concentrate not on individual incidents, but on the overall scenario." *Andrews v. City of Philadelphia,* 895 F.2d 1469, 1484 (3d Cir.1990). In contrast, the Eighth Circuit, among others, fails to view the record as a whole and addresses each piece of evidence individually and in isolation and often concludes that none of them creates a material issue of fact. *See e.g.*, *Wittenburg*, 464 F.3d 836-842 (addressing pretext evidence as "First," Second," "Third," "Fourth," "Fifth," "Finally"); *Canady v. Wal-Mart Stores, Inc.*, 440 F.3d 1031, 1036 (8th Cir. 2006) (Sr. J. Lay in dissent) (majority failed to view record as a whole in granting summary judgment against terminated employee in hostile work environment and disparate treatment claims where supervisor repeatedly called plaintiff a "lawn jockey," used the word "nigger" in front of him, greeted plaintiff with the phrase, "What's up my nigga?," and told plaintiff that a black man's skin color rubs off on a towel when he sweats); *Kulumani v. Blue Cross Blue Shield Ass'n*, 224 F.3d 681, 685 (7th Cir.2000) (failing to consider evidence supportive of prima facie case in analysis of pretext).[15] Based on this split in the Circuits, this Court should grant Wittenburg's petition for a writ of certiorari.

[15] *See also* Arthur R. Miller, The Pretrial Rush to Judgment, 78 N.Y.U. L. Rev. 982, 1071 (2003) (noting temptation when viewing (Cont'd)

Wittenburg respectfully submits that the Third Circuit's totality of the evidence standard for analyzing pretext at the summary judgment stage is in keeping with this Court's pronouncements. In *Reeves*, this Court clarified the proper summary judgment standard for analyzing an employment discrimination case. *See Reeves*, 530 U.S. at 150-51. According to the Court, a court must review "all of the evidence in the record." *Id.*, 530 U.S. at 150; *see also Matsushita*, 475 U.S. at 587 (court must review the record "taken as a whole" on summary judgment). In doing so, however, a court "must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Id.* According to the Court, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions not those of a judge." *Id.*

In applying this standard in *Reeves*, the Court admonished the Court of Appeals for not reviewing all of the evidence in the record. *Id.*, 530 U.S. at 152. In particular, the Court found that the lower court erroneously disregarded "critical evidence favorable to plaintiff" that supported plaintiff's *prima facie* case and that undermined the employer's nondiscriminatory explanation. *Id.* In addition, the Court admonished the Court of Appeals for failing to draw all reasonable inferences in favor of the plaintiff as the nonmoving party. *Id.* As examples, the Court noted that the lower court had erred by discounting certain age-

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(Cont'd)
material on a pretrial motion without the safeguards of a trial setting "to treat the evidence in a piecemeal rather than a cumulative fashion, draw inferences against the nonmoving party, or discount the nonmoving party's evidence by weighing it against contradictory evidence."); McCormick, The Allure and Danger of Practicing Law as Taxonomy, 58 ARK. L. REV. at 183 (noting that the *McDonnell Douglas* test itself causes some courts "to get bound up in the taxonomy of the evidence, placing each piece into a separate box and evaluating each box separately rather than looking at the whole picture to determine whether discrimination occurred.").

related comments because they were not made in the context of the plaintiff's termination, by discrediting the plaintiff's evidence regarding the identity of the decision maker while crediting the employer's evidence that others also involved in the termination decision were not motivated by age animus, and by crediting the employer's evidence that on occasion others outside the protected class were treated the same as plaintiff or that others within the protected class were treated favorably by the employer. *Id.*, 530 U.S. at 152-53. Based on these examples, the Court concluded that "the Court of Appeals impermissibly substituted its judgment concerning the weight of the evidence for the jury's." *Id.* 530 U.S. at 153.

In this case, it is clear that the Eighth Circuit failed to review the record as a whole in derogation of *Reeves* and *Matsushita.* The Court of Appeals disregarded critical evidence supportive of Wittenburg's prima facie cases and that undermined AEFA's sole reliance on her disputed 2002 performance evaluation to justify her termination. In assessing pretext, the Court failed to consider Wittenburg's qualifications as an analyst in that she consistently provided excellent service and was voted "Analyst of the Year." The Court also failed to consider that the decision makers involved in her termination and the performance evaluation used to trigger her termination, Truscott and Mahowald, were substantially younger than she. In addition, the Court never addressed Mahowald's written "bullsh-t" comment in connection with the performance evaluation process which called into question the validity of his ensuing personnel ratings.

Likewise, the Court failed to address when Wittenburg presented Mahowald with the Starmine evidence demonstrating her high 2002 performance that Mahowald had agreed with her that the 2002 G/4 rating did not make sense. Moreover, the Court never dealt with Mahowald's statements to Wittenburg in September 2003, shortly before the November reduction-in-force, that she should not worry about her G/4, that her numbers were very good, and AEFA was "happy" with her performance.

Further, the Court ignored portfolio manager Kennedy's specific request to management to retain Wittenburg because of the fine work she had done. Finally, the Court failed to consider the evidence that the few female analysts in the Department besides Wittenburg had suffered various degrees of prejudicial treatment.

The Court of Appeals also viewed the evidence supportive of Wittenburg's claims in complete isolation. For example, the Court dismissed the fact that Wittenburg was only one of two females in a 26 person department because that evidence "*alone* is insufficient to show discriminatory animus." Similarly, the Court discarded Wittenburg's evidence that Mahowald stated "Your husband has a job, doesn't he?" within hours of her termination because "[i]nferring gender bias on this statement *alone* is not reasonable." As mentioned previously, the Court considered the discriminatory statements of Truscott, Rivera, and Forker as a group but held that those three statements in and of themselves were not sufficient to prove pretext. Based on the Court's seriatim consideration, isolation, and rejection of the evidence, it is clear that the Court failed to consider the totality of the evidence in ruling on the motion for summary judgment.

It is also clear that the Court of Appeals failed to draw reasonable inferences from the evidence in Wittenburg's favor as the nonmoving party. For example, the Court found that Mahowald had rated Wittenburg's 2002 performance as a G/3 and that a review committee lowered it to G/4, despite the fact that Wittenburg had produced a memo showing that Mahowald in fact had rated her a G/4. Similarly, the Court credited Mahowald's explanation that Wittenburg did not receive credit for being the only analyst to evaluate unrated stocks because her efforts allegedly did not result in a profit, over Wittenburg's evidence that evaluating those stocks in and of themselves was Mahowald's "number one priority." Furthermore, Truscott had referenced the failure to evaluate those stocks as a justification for Wittenburg's termination, which was false and pretextual as applied to her. In addition, the Court found that Wittenburg

did not dispute that Ramos' ratings were better than hers when in fact Wittenburg's main arguments were that her 2002 performance evaluation was biased, inaccurate, and discriminatory, and that Ramos had received an L/1 ultimately because of his age and gender.

The Court of Appeals also failed to credit Wittenburg's evidence that as a result of the "make-over" the 8 oldest analysts had been terminated or resigned. Instead, the Court credited the employer's evidence that a number of individuals in the protected class had been retained, even though only one was above 50 years of age (51) and the rest were under 50. Similarly, the Court refused to credit Wittenburg's evidence that Mahowald and Rivera had rated her as "maybe drop" and younger males as "keep" despite the fact that her overall rating was higher than theirs. Rather, the Court credited the employer's evidence that a couple of the younger males had received higher scores than Wittenburg in certain sub-categories, although not in the overall ratings.

The Court of Appeals further refused to draw an adverse inference from the fact that Mahowald never provided Wittenburg with a copy of her 2002 performance evaluation because Mahowald did not provide any analyst with a written review. The Court overlooked the fact that Wittenburg repeatedly had contested her performance rating and that Mahowald had promised her a copy "in the near future." Given these facts, a reasonable juror could question AEFA's sole reliance on this particular performance evaluation to justify Wittenburg's termination. Furthermore, the Court failed to credit Wittenburg's evidence that within months of the November 2003 RIF, AEFA solicited analysts to cover "multiple assigned sectors," including "insurance, mortgage-related, *technology* and consumer industries," where AEFA had justified its November 2003 RIF based on a purported desire to retain individual sector expertise. Instead, the Court credited the employer's claim that these new "multiple assigned sector" positions were not "substantially

similar" to Wittenburg's Technology Sector position to permit an inference of pretext.

Based on the Eighth Circuit's failure to review the record as a whole and draw all inferences in Wittenburg's favor, the Circuit Court of Appeals impermissibly weighed the evidence, made credibility determinations, and substituted its judgment for that of a jury's. Accordingly, this Court should grant Wittenburg's petition for certiorari in order to reinforce and clarify the teachings of *Reeves* and the importance in employment discrimination cases on summary judgment of reviewing the evidence in the record as a whole and of drawing all inferences in favor of the nonmoving party.

IV. Review Is Necessary To Resolve A Conflict Whether A Six Year Age Difference Between A Plaintiff And Her Replacement Is Sufficient To Permit An Inference Of Age Discrimination

In *O'Connor*, this Court held that an age discrimination plaintiff did not have to show that he was replaced by someone outside of the protected class in order to establish a *prima facie* case of discrimination. *O'Connor*, 517 U.S. at 312-13. Rather, a plaintiff only had to present evidence to create an inference of age discrimination. *Id.* According to the Court, such an inference could be drawn, for example, where the replacement is "substantially younger" than the plaintiff. *Id.* The Circuit Courts since have grappled with the meaning of the phrase "substantially younger" and come to differing conclusions. *See Grosjean v. First Energy Corp.*, 349 F.3d 332, 338 (6th Cir. 2003) (collecting cases).

With respect to the specific issue whether a six year difference is "substantially younger" to permit an inference of age discrimination, the Circuits are split. On the one hand, the Eleventh Circuit relying on its own precedent has found that a six year age difference between a plaintiff and her replacement is sufficient to create an inference of age discrimination. *Damon v. Fleming Supermarkets Of Florida, Inc.*, 196 F.3d 1354, 1360 (11th Cir. 1999) (five years sufficient). On the other hand, the

Eighth and Sixth Circuits have concluded that a six year difference is not substantially younger to permit the age discrimination inference. *Wittenburg*, 464 F.3d at 840 (6 year difference is not substantially younger); *Grosjean*, 349 F.3d at 340 (holding that "age difference of six years or less between an employee and a replacement is not significant").

The Tenth Circuit specifically rejected the Sixth Circuit's bright line test in *Whittington v. Nordam Group Inc.*, 429 F.3d 986 (10th Cir. 2005). In declining to establish any rigid barriers, the Court found that a five year age difference between a plaintiff and his replacement "should be but one factor weighed by the jury." According to the Court:

> We are not convinced that all five-year age differences are the same. The replacement of a 45-year-old by a 40-year-old would be less suspicious than the replacement of a 62-year-old by a 57-year-old. Comparing a 62-year-old worker with one who is 57, an employer may think it better to retain someone who will stay with the company another eight years (until age 65) rather than one who would be retiring in three years, less than half the time. Or a company may simply wish to rid itself of its older workers, beginning with the oldest.

Id., 429 F.3d at 996. The Third Circuit appears to follow a similar path: "there is no 'particular age difference that must be shown,' but while '[d]ifferent courts have held . . . that a five year difference can be sufficient, . . . a one year difference cannot.'" *Showalter v. Univ. of Pittsburgh*, 190 F.3d 231, 236 (3d Cir. 1999). Wittenburg respectfully submits that this Court should grant certiorari in this case to resolve the split in the Circuits about whether a six year age difference can be "substantially younger" and, in doing so, should find like the Tenth and Third Circuits that such an age differential may permit an inference of age discrimination based on the totality of the evidence.

CONCLUSION

The Eighth Circuit and other Courts of Appeal are defeating the intent of Congress and resisting the teachings of this Court in order to avoid trials in employment discrimination cases. In various Circuits, summary judgment practice forces plaintiffs to prove pretext, link discriminatory remarks to the ultimate discharge decision, have their evidence judged in isolation rather than organically, and face an inflexible rule on age differential regardless of context. In circumstantial cases, where victims of discrimination cannot produce direct evidence, one must question whether these causes of action remain worth pursuing.

For all the foregoing reasons, Petitioner Wittenburg respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT FILED SEPTEMBER 28, 2006

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

No. 05-4038.

Bonnie WITTENBURG,

Appellant,

v.

AMERICAN EXPRESS FINANCIAL ADVISORS, INC.,

Appellee,

American Association of Retired Persons, Amicus on Behalf of Appellant.

Submitted: May 19, 2006.

Filed: Sept. 28, 2006.

Rehearing and Rehearing En Banc Denied Nov. 16, 2006.*

Before BYE, HANSEN, and SMITH, Circuit Judges.

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* Judge Riley did not participate in the consideration or decision of this matter.

Appendix A

SMITH, Circuit Judge.

Bonnie Wittenburg, a former Equity Research Analyst for American Express Financial Advisors, Inc.'s ("AEFA") Equity Investment Department ("EID"), brought this employment discrimination suit against AEFA, asserting gender discrimination and age discrimination in AEFA's termination of her employment. AEFA filed a motion for summary judgment, which the district court[1] granted. Wittenburg appeals, arguing that she presented sufficient evidence to support her age and gender discrimination claims. We affirm.

I. *Background*

AEFA provides financial planning, advice, asset management, insurance, and annuities to clients, primarily through a network of financial advisors; in addition, AEFA manages mutual funds. In November 1998, AEFA hired Wittenburg, then age 46, to work in its Minneapolis office as an Equity Research Analyst in the Technology Sector of the EID. When AEFA hired Wittenburg, she was one of two female analysts in an approximately 26-person department. According to Raymond Hirsch, former Group Director of the Technology Sector, Wittenburg worked hard, displayed "excellent investment skills," and provided "first class service" to the portfolio managers. In fact, Wittenburg was named "Analyst of the Year" in 2000 because of her "outstanding efforts and achievements."

1. The Honorable Joan N. Ericksen, United States District Judge for the District of Minnesota.

Appendix A

In Fall 2001, AEFA hired Ted Truscott as its Chief Investment Officer ("CIO") to manage all investment activity at AEFA. As CIO, Truscott directly supervises the senior portfolio managers in the EID who, in turn, supervise the associate portfolio managers and analysts. Analysts do not report directly to Truscott. Truscott subsequently promoted analyst Tom Mahowald to the position of Director of Equity Research, thereby making Mahowald Wittenburg's direct supervisor. Thus, Wittenburg reported to Mahowald, and Mahowald reported to Truscott.[2]

In February 2002, Truscott initiated a two-year project to redesign the EID. The redesign project involved the addition of three portfolio managers hired from a competitor, the creation of a new satellite office in Boston, and the merger or movement of certain funds to AEFA's satellite offices in San Diego, Boston, and New Jersey. In discussing AEFA's hiring of the three new portfolio managers, Truscott stated that AEFA planned on hiring more managers in Boston because AEFA "need[ed] to be competitive as the best fund families out there. We will hire talent where we feel we have gaps. That said, we are not averse to hiring younger portfolio managers or analysts and growing them."

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2. In late 1999, when Mahowald was still an analyst, he had a conversation with Kay Doremus, a fellow analyst, about the chief of the investment department's comment that one analyst would be eliminated per year. Doremus expressed her fear to Mahowald that she would be fired because she received a written performance warning. Mahowald agreed that AEFA tended to terminate one person per year, but he commented that "you have to make concessions because a lot of these guys are the sole support for their families." At the time, Doremus was the major breadwinner for her family.

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As part of the February 2002 redesign plan, AEFA included a reduction-inforce ("RIF"), which, according to Truscott, was necessary and "related to the transfer of investment portfolios to the newly formed Boston office." The February 2002 RIF involved only portfolio managers. One of the portfolio managers terminated in the RIF was Al Henderson, age 62. According to Henderson, Dan Rivera, Head of the Equities Department and a decisionmaker in the February 2002 RIF, told him that he was fired because AEFA wanted to retain "those that were younger" because younger employees have "more years of service ahead of them."

The second RIF occurred in June 2002 and was, according to Truscott, "related to the transfer of portfolios to the then being established San Diego office." This RIF primarily impacted portfolio managers; however, three analyst positions in Minneapolis were also eliminated.[3] As part of the redesign process, a team comprised of Human Resources Relationship Leader Judith Forker, Mahowald, Portfolio Managers Dan Rivera, Warren Spitz, Gordon Fines, and Human Resources personnel Patty Bales and Craig Dewald, created a talent review of the approximately 25 people in the department. This review included performance ratings for each analyst for the years 1999, 2000, and 2001, unless the analyst had not been employed during some or all of those years. In addition, the review evaluated the analyst's independent researching skills, communication skills, and

3. A document entitled "Equity Investments Group Strategy: Reorganization Impacts," shows a total analyst reduction of seven analysts in the June 2002 RIF. Three analysts would be displaced, two analysts would be transferred, and two analysts would make "assumed moves" to the portfolio team.

whether the analyst was a team player. The review also indicated whether the analyst was a "keep," "maybe keep," "maybe," "maybe drop," or "drop." These ratings were generated to educate the leaders about the individuals working in the department and to identify employees in the department that might be affected by the reorganization.

In late 2002, the EID held its ratings alignment meeting attended by Truscott, Mahowald, Forker, Director of Compensation Sherry Johnson, and Portfolio Managers Spitz, Fines, Rivera, John Schonberg, and Jim Johnson. The group first discussed Mahowald's proposed ratings for each of the analysts, including Wittenburg. The proposed ratings were subject to change based on the group's discussion.[4] Mahowald's proposed rating for Wittenburg was G3/L3, but after the ratings alignment meeting, her 2002 rating was lowered to a G4/L3. The other Technology Sector analysts' ratings in 2002 were: G3/L3 for David Friedrichsen (age 40),

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4. At the end of each year, AEFA reviews employees' performances. Each employee receives two ratings at the end of the year: one for goal achievement, the "G" rating, and one for demonstration of leadership competencies, the "L" rating, with 1 being the highest rating and 5 being the lowest rating. The year-end performance evaluation begins in September with the entry of performance data for each analyst into AEFA's human resources system. This data includes analysts' self-appraisals, which were submitted to Mahowald for his review and comments, and a preliminary performance rating determined by Mahowald based on the comments of portfolio managers, his own comments, and the information available to him at the time with respect to analysts' recommendations verses the "S & P 500" and the investment "universe."

G3/L1 for Kurt Lauber (age 35), and G3/L1 for Dean Ramos (age 39).

Wittenburg's low rating in 2002 was mainly because of her poor performance on funds and negative input she received from portfolio managers. Although Wittenburg was the only analyst to complete a special project that Mahowald assigned, which consisted of picking up unrated stocks in the fourth quarter of 2002, her ratings on those stocks did not help the portfolio managers make money and consequently was not a positive consideration in her rating.[5]

Wittenburg complained about her 2002 rating to Mahowald. At that time, she asserted that her G4 rating was too low based on "Starmine" data for 2002. Starmine rated Wittenburg's 2002 performance highly, awarding her four stars out of a maximum of five stars. Wittenburg, however, acknowledged that Mahowald did not have access to the Starmine information on her 2002 performance when he gave her the G4 rating. Mahowald agreed with Wittenburg about what the "Starmine" data showed, but he disagreed that the data should have impacted her performance rating,

5. Wittenburg was not assigned a special "private placements" project that Mahowald assigned to Ramos and Lauber. Ramos and Lauber received L1 scores, in part, because of this special project. Mahowald testified in his deposition that AEFA "had significant private placement activities and we had a portfolio that had lots of private placements in it and those stocks that went into that portfolio needed to be covered by the analysts. And so if that private placement was done in that analyst's area of expertise, they logically had extra work to do to research and recommend and otherwise monitor that investment."

considering AEFA does not use the Starmine data for evaluating performance.[6] According to Mahowald, "Starmine was a system that [he] was looking at to evaluate analysts' performance. [He] started that in 2003. In doing so, [AEFA] fed Starmine historical data [for] 2002." AEFA uses Starmine as an "analyst tool."

In September 2003, Truscott informed Mahowald that a third RIF would occur. In October 2003, Mahowald, Forker, Chief Administrative Officer Pete Gallus, Director of Compensation Sherry Johnson, Schonberg, Spitz, and Bales met to determine how many analysts AEFA would need to cover each of the sectors of mutual fund products located in Minneapolis. They determined that AEFA only needed to retain one Technology Sector analyst based on business need; therefore, three of the four Technology Sector analyst positions would be eliminated. To implement the RIF, AEFA used the multiple incumbent process.[7] Consistent with that process, the performance ratings of analysts for 2002 and, in the event of a tie, 2001, were used in determining which analysts within each sector to terminate. Like all other analysts, Wittenburg's 2002 ratings were used.

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6. When counsel for AEFA asserted that AEFA did not use the Starmine data for evaluating performance, Wittenburg agreed, stating, "That is correct. But AEFA did feed Starmine data. They had our data."

7. AEFA applied the multiple incumbent process to analysts by sector-financial, consumer, industrial, health care, and technology-as opposed to grouping all of the analysts into one big "pool" as AEFA did in the 2002 RIF.

Appendix A

With regard to the Technology Sector, AEFA terminated Wittenburg, age 51, in the third RIF, along with Friedrichsen, age 41, and Lauber, age 36. Only Ramos, age 40, was retained. All of the sectors combined had a total of 17 analysts, 11 of which were 40 years or older and 2 of which were women. Ultimately, of the 7 analysts selected for job elimination, 4 were 40 years or older and 1, Wittenburg, was a woman. AEFA retained 51-year-old Sandy Hollenhorst, who was hired by Mahowald in 2001.

AEFA notified Wittenburg of her position elimination on November 18, 2003, in a meeting with Truscott and Forker. Wittenburg asked why AEFA selected her position for elimination. Truscott and Forker explained that the decision was based on AEFA's desire to keep only one Technology Sector analyst; therefore, based on her low 2002 rating, she was identified as one of the three analysts for termination. When Wittenburg told Truscott that she disputed her G4/L3 rating, Truscott, according to Wittenburg, "start[ed] going on about in '02 people did not rate the six rated stocks." Wittenburg, however, did not respond to Truscott. She was upset that she "was not given credit" for "getting the six rated stocks" because she was the only person in her department who had. Wittenburg's employment with AEFA ended on January 9, 2004. According to Wittenburg, within hours of her termination, Mahowald spoke with her and said, "Your husband has a job, doesn't he?"

After her termination, Wittenburg sought a position as a portfolio manager at AEFA but was not hired. She subsequently brought suit against AEFA, asserting claims of age discrimination under the Age Discrimination in

Employment Act (ADEA), 29 U.S.C. §§ 621-634, gender discrimination under Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e to 2000e-17, and gender and age discrimination under the Minnesota Human Rights Act (MHRA), Minn.Stat. §§ 363A.01-.41. Wittenburg now appeals the district court's grant of summary judgment to AEFA on her gender discrimination and age discrimination claims.

II. *Discussion*

Wittenburg argues that the district court erroneously granted summary judgment to AEFA on her age and gender discrimination claims because material issues of fact remain unresolved.

We review the district court's grant of summary judgment de novo. *Wallace v. Sparks Health Sys.*, 415 F.3d 853, 858 (8th Cir.2005). Therefore, "our task in this appeal is to decide whether the record reveals issues of material fact that would prevent the entry of summary judgment in favor of [AEFA]." *Id.* at 860. In completing this task, we are mindful that we "do not sit as a super-personnel department to review the wisdom or fairness of [AEFA's] job-elimination policies during the RIF." *Id.*

We apply the familiar burden-shifting analysis of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). This analysis requires the plaintiff to establish a prima facie case of discrimination. *Id.* We, like the district court, assume without deciding that

Wittenburg established a prima facie case of both age and gender discrimination.[8]

In addition, both parties agree that AEFA proffered a legitimate, nondiscriminatory reason under the *McDonnell Douglas* test for Wittenburg's termination in the November 2003 RIF: that AEFA conducted a RIF in 2003 based on financial and business reasons and terminated Wittenburg during the RIF on the basis of her low 2002 performance rating. Accordingly, our task is to determine whether a genuine issue of material fact remains whether AEFA's non-discriminatory reason was pretextual. *Id.* at 804, 93 S.Ct. 1817.

A. *Age Discrimination*

Wittenburg argues that she presented sufficient evidence from which a reasonable fact-finder could conclude that age played a role in her termination and that AEFA's proffered reasons for her termination are pretextual.

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8. To establish a prima facie case of age discrimination resulting from a RIF, the plaintiff must show that (1) she is at least 40 years old; (2) she was qualified for the job; (3) she was discharged; and (4) age was a factor in the employer's decision to terminate her. *Chambers v. Metro. Prop. & Cas. Ins. Co.*, 351 F.3d 848, 855 (8th Cir.2003). To establish a prima facie case of gender discrimination, the plaintiff must show that (1) she is a member of a protected class; (2) she was qualified for the job; (3) she was subjected to an adverse employment decision; and (4) she was treated differently than similarly-situated males. *Hesse v. Avis Rent A Car Sys.*, 394 F.3d 624, 631 (8th Cir.2005).

Appendix A

First, Wittenburg relies on the following statements of AEFA personnel to support her age discrimination claim: (1) Truscott's statement that AEFA is "not averse to hiring younger portfolio managers or analysts and growing them;" (2) Forker's 2002 notes indicating that the analyst department would "maybe add a junior person;" and (3) Rivera's comment during the February 2002 RIF that AEFA wanted to retain "those that were younger" because they have "more years of service ahead of them."

A plaintiff must establish " *some* causal relationship" to show "the significance of [decisionmakers'] non-contemporaneous statements, or statements made by persons other than the relevant decision-maker, to the resolution of the ultimate issue of intentional discrimination." *Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 779 (8th Cir.1995) (emphasis in original). Therefore, we consider factors such as (1) whether the statements were made by employees who took part in the decision or influenced the decision to terminate the plaintiff; (2) the time gap between when the statements were made and the date of termination; and (3) "whether the statement itself" is "an exhibition of discriminatory animus" or merely an "opinion that such animus might exist." *Id.; see also Frieze v. Boatmen's Bank of Belton,* 950 F.2d 538, 542 (8th Cir.1991) (holding that comments from the president of the company did not "create a reasonable inference of discrimination" because the president's comment to the employee that he had "waited too long . . . to start [his] effort towards becoming president of a bank and [the employee] would never make it" was made four years before the employee was discharged and before the president was actually the president).

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Truscott, a decision-maker, made a general statement regarding the company's willingness to hire younger workers. Such a generalized statement does not evince a discriminatory policy or practice, nor does it tend to establish that age was the basis for Wittenburg's termination over a year later. The facts as alleged by Wittenburg do not establish any causal connection between Truscott's statement and her termination.

Likewise, Forker's reference to "junior person" in her notes does not show discriminatory intent. Wittenburg has failed to present evidence that Forker equated "junior person" to a "younger person" or how such a notation relates to her termination in the 2003 RIF.

Additionally, Wittenburg admits that Rivera was only a decisionmaker in the initial phase of the department downsizing, not in the 2003 RIF. Rivera's comment could be characterized as a non-contemporaneous, non-decisionmaker's opinion about company retention policy during a prior RIF. Taken together, these comments by AEFA personnel fall short of establishing pretext in AEFA's stated nondiscriminatory purpose given for her termination.

Second, Wittenburg points out that AEFA "got rid" of the eight oldest analysts in the department by the end of the "two-year makeover plan" and gave four of the five oldest analysts low G4 or L4 ratings in 2002, thereby setting them up for termination in the 2003 RIF.[9] Wittenburg, however, ignores evidence that several members of the protected class

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9. Only six of the eight analysts were actually terminated; two of the analysts resigned.

survived the RIFs. Out of 31 analysts affected by the 2002 and 2003 RIFs, 17 were 40 years old or older. Of those 17 analysts, 6 were terminated, 4 resigned, and 7 survived the RIFs. In comparison, of the 14 analysts in the non-protected class, 4 were terminated, 2 resigned, 2 were transferred to the hedge fund, and 6 survived the RIFs. Also, of the 20 analysts evaluated, Steve Schroll, age 46, and Paul Stocking, age 41, both members of the protected class, ranked 1 st and 2nd, respectively, in the 2002 analyst rankings. In addition, the two analysts terminated with Wittenburg from the Technology Sector were both *younger* than she-Friedrichsen, age 41, and Lauber, age 36. Furthermore, Hollenhorst, who was the *same age* as Wittenburg in 2003 (age 51), was *not* terminated during the 2003 RIF.

Third, Wittenburg argues that Mahowald demonstrated age discrimination by rating Wittenburg a "maybe drop" during the June 2002 RIF, while ranking younger employees with lower scores in the "keep" category.[10] Wittenburg,

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10. Wittenburg labels these "younger" analysts as receiving lower scores than her scores. However, a close examination of the scores reveals their scores were comparable to or better than Wittenburg's scores. Three of the "younger" analysts-Tom Howell, Henry Kaczmarek, and Paul Stocking-all received higher "G" ratings than Wittenburg in 2001. The other two analysts-Laton Spahr and Mark Thompson-received the same "G" rating as Wittenburg in 2001. For 2000, Stocking received a higher "G" rating than Wittenburg, Howell and Kaczmarek received a lower "G" rating than Wittenburg, and Spahr and Thompson were not yet employed at AEFA. For 1999, Wittenburg did receive a higher score than Howell, Kaczmarek, and Stocking, but Spahr and Thompson were not yet employed at AEFA.

(Cont'd)

however, survived this first round of layoffs. In addition, of the three analysts selected for termination in the June 2002 RIF, only two of the three analysts were over 40 years of age. Furthermore, Wittenburg does not challenge AEFA's contention that these performance ratings were not used in the 2003 RIF.

Fourth, Wittenburg challenges AEFA's explanation for the RIFs, noting that Truscott stated that the RIFs were for cost-cutting, while AEFA represented to the district court that the RIFs were done to improve performance funds and *not* for cost-cutting. Truscott consistently testified, however, that the reason for the RIF was to redesign the EID, moving analysts positions from the Minneapolis office to the satellite offices. In addition, Truscott testified specifically about the 2003 RIF, stating that it was to employ the portfolio manager model and to reduce costs in the EID. A company need not provide evidence of financial distress to make an RIF

(Cont'd)

As for the other categories, Wittenburg ranked the same as Spahr, Thompson, and Howell, in the "independent research" category, while Kaczmarek and Stocking ranked higher than Wittenburg. In the "focus on key investment metrics" category, Wittenburg again ranked the same as Spahr, Thompson, and Howell, while Kaczmarek and Stocking ranked higher than Wittenburg. In the "opinions, convictions" category, Spahr, Thompson, Kaczmarek, and Stocking ranked higher than Wittenburg, while Howell ranked the same as Wittenburg. In the "all comm." category, Wittenburg ranked higher than Howell, Kaczmarek, and Stocking, and the same as Spahr and Thompson. In the "team player" category, Wittenburg ranked slightly higher than the five analysts. Finally, in the "visible" category, Wittenburg ranked higher than Thompson, Howell, Kaczmarek, and Stocking, while ranking the same as Spahr.

"legitimate." *Evers v. Alliant Techsystems, Inc.*, 241 F.3d 948, 956 (8th Cir.2001). Truscott never represented that cost reduction was *not* a consideration for the 2003 RIF. Rather, AEFA's counsel apparently made such a statement during argument to the district court where she stated that "cost cutting" was not a reason for the RIFs. However, arguments of counsel are not evidence. *See United States v. Mullins*, 446 F.3d 750, 760 (8th Cir.2006).[11]

Fifth, Wittenburg asserts that AEFA's reliance on her 2002 "G4/L3" rating to justify her termination is pretextual because (1) Mahowald conducted the performance evaluation knowing that there could be another RIF within the department in 2003 and that his performance ratings would determine which analysts would be eliminated; (2) Mahowald failed to present Wittenburg with a written review of her rating; (3) she received a high rating from Starmine based on the same performance data that AEFA used; (4) inaccuracies appear in the 2002 performance evaluation; (5) other similarly situated employees outside of her protected class received more favorable ratings; and (6) AEFA used a single year's performance evaluation to justify her termination.

Wittenburg relies on an email[12] that Dewald sent to

11. We also reject this challenge as it applies to Wittenburg's gender discrimination claim.

12. Dewald's email to Mahowald stated that "while Ted [Truscott] may be thinking longer-term Option 2, I don't think this should deter you from driving Option 1.2003/2004 is a long way off and if you can really make an impact with Central Research over time, Option 2 may become a mute [sic] point 18 months from now."

Mahowald in April 2002 to prove that Mahowald knew that another RIF could occur in 2003. However, the email does not establish that fact. Dewald said that "Option 2 may become a mute [sic] point 18 months from now," indicating a lack of certainty. Furthermore, after the June 2002 RIF, Mahowald sent an email to the EID stating that "[t]here is no second shoe to drop."

Regarding Mahowald's failure to present Wittenburg with a written review of her rating, *no analyst*-either within the protected class or outside the protected class-received written reviews in 2002. In addition, Mahowald met separately with each analyst to orally deliver his 2002 year-end performance reviews.

Wittenburg's high Starmine rating is also insufficient to prove pretext. Wittenburg admits that Mahowald did not have access to her 2002 Starmine rating when he gave her the G3 rating, which was changed at the ratings alignment meeting to a G4. In addition, Wittenburg admits that AEFA never used Starmine data for evaluating performance.

As to the inaccuracies in her 2002 performance evaluation, Wittenburg points to an error by the hedge fund managers stating that she had recommended the purchase of a certain stock for several months when, in fact, she had the stock rated neutral for nearly the entire year. Wittenburg, however, does not allege that Mahowald knew of this "erroneous assumption" when he analyzed the portfolio manager feedback, which indicated below average results for Wittenburg. Also, although Wittenburg argues that the "L" rating is subjective, "the presence of subjectivity in

employee evaluations is *itself* not a grounds for challenging those evaluations as discriminatory." *Hutson,* 63 F.3d at 780 (emphasis added). Instead, Wittenburg must present "affirmative evidence that [AEFA] manipulated the rating system" to discriminate against her on an impermissible basis. *Id.* Wittenburg attempts to meet this burden by arguing that she received an L3 rating despite being the only analyst to complete Mahowald's special project for 2002. However, Mahowald explained that although Wittenburg was the only analyst to complete the special project, her ratings on the stocks did not help portfolio managers make money and consequently was not a positive consideration in her rating. Mahowald also stated that her L3 rating was a direct result of the negative feedback portfolio managers gave Wittenburg.

Wittenburg next argues that Mahowald intentionally rated her lower in 2002 as a pretext for age discrimination. Wittenburg contends that similarly situated employees outside of her protected class were treated more favorably in terms of their L ratings. Specifically, she argues that Mahowald elevated the L ratings of Ramos, Lauber, and Steve Roorda by crediting them for completing a special "private placement" project that she was not assigned. Mahowald, however, explained that these analysts only received the special project because the private placements were "done in that analyst's area of expertise, [meaning that] they logically had extra work to do to research and recommend and otherwise monitor that investment." Furthermore, Wittenburg overlooks that, in 2002, Roorda, age 45, fell within the protected age group.

She also challenges her 2002 ratings based on AEFA's reliance only on the 2002 performance evaluations in deciding which analysts to terminate in the 2003 RIF. We have noted, however, that "[t]here is nothing inherently discriminatory in an employer choosing to rely on recent performance data more heavily than past performance in deciding which employees to terminate in a RIF," as this is a business judgment properly left to the employer's discretion. *Hutson*, 63 F.3d at 780. Truscott explained that AEFA measures analysts' performance in the "short run" because "many consumers look at one-year performance and make their decisions on this" and because "the track record at American Express had been so terrible that we needed to see how we were doing on a one-year basis."[13]

Finally, Wittenburg argues that pretext is also shown by conflict in AEFA's statements and its hiring actions. According to Wittenburg, AEFA claimed it needed only one Technology Sector analyst but then immediately assigned significant Technology-Sector stock coverage to Industrial Sector analysts Roorda, age 45, and Larry Alberts, age 49, and advertised for analysts to fill two vacancies two months after the 2003 RIF. However, "[e]mployers often distribute a discharged employee's duties to other employees performing related work for legitimate reasons." *Frieze*, 950 F.2d at 541. To prove that her termination was because of her age, a plaintiff needs to present evidence that her "discharge was part of a pattern of [the employer's]

13. We also reject Wittenburg's assertion that AEFA's reliance on her 2002 "G4/L3" rating to justify her termination is pretextual as it relates to her gender discrimination claim.

discharging employees over forty and distributing their work to younger employees." *Id.* Here, Wittenburg has presented no such evidence.

Furthermore, Roorda and Alberts are actually in the same protected class as Wittenburg. However, because "the ADEA prohibits discrimination on the basis of age and not class membership," we look to whether the replacement is "substantially younger" than the plaintiff. *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 313, 116 S.Ct. 1307, 134 L.Ed.2d 433 (1996). Therefore, we may not "rely on an arbitrary above 40/below 40 rule." *Schiltz v. Burlington N. R.R.*, 115 F.3d 1407, 1413 (8th Cir.1997) (holding that plaintiff's age discrimination claim failed where "[t]wo positions were filled by individuals older than or the same age as [the plaintiff]. Four positions were filled with individuals younger than [the plaintiff]. However, of these four positions, the largest age disparity between [the plaintiff] and the individual hired for the job was five years."). We conclude that Roorda and Alberts are not "substantially younger" than Wittenburg, as the largest disparity between Wittenburg and Roorda is six years.

As to AEFA advertising to fill two vacancies two months after the RIF, the two vacancies arose from among the ten *surviving* analyst positions. Therefore, AEFA did not create two new analyst positions after terminating Wittenburg. And, although Wittenburg argues that posting the new positions as "multiple sector" positions demonstrates pretext because AEFA had previously rejected "pooling" analysts, Wittenburg has failed to show that the postings were for a job

substantially similar to her Technology Analyst position.[14] Accordingly, we hold that Wittenburg has failed to prove pretext in her age discrimination claim.[15]

B. *Gender Discrimination*

Wittenburg next asserts that she presented sufficient evidence of gender-based animus and proved that AEFA's proffered reason for her termination was a pretext for gender discrimination.

First, Wittenburg points out that, at the time of her hiring, she was only one of two female analysts in a department of 26 analysts. The number of female versus male analysts is relevant; however, it alone is insufficient to show discriminatory animus.

Second, Wittenburg argues that she proved gender-based animus because of Mahowald's comment to Doremus that "you have to make concessions because a lot of these guys are the sole support of their families." Just as in *Frieze* where

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14. As to Wittenburg's gender discrimination claim, we also reject her argument that evidence of pretext can be found in AEFA's assigning Technology Sector stock coverage to two male Industrial Sector analysts and advertising for analysts to fill two vacancies shortly after the 2003 RIF. Regarding vacancies at AEFA after the 2003 RIF, AEFA actually hired Penny Kyle to fill the associate portfolio manager position.

15. Because the same analysis applies to MHRA claims as ADEA claims, Wittenburg's MHRA age discrimination claim also fails. *Ace Elec. Contractors, Inc. v. Int'l Bhd. of Elec. Workers, Local Union No. 292*, 414 F.3d 896, 900 (8th Cir.2005).

the president's comment was made four years before the employee was discharged and before the president was actually president, Mahowald made this comment four years before the 2003 RIF and before he was hired to run the EID. Therefore, Wittenburg has failed to show a causal relationship between Mahowald's 1999 comment and her termination in 2003.

Third, Wittenburg notes that Mahowald hired Blair Brumley, age 39, as an analyst weeks after the June 2002 RIF. Mahowald hired Brumley after two *males* were terminated in the 2002 RIF. Wittenburg contends that Mahowald told her that he was hiring Brumley because he had been unemployed for ten months and that Mahowald "also talked about Blair's [Brumley] family." Wittenburg argues that Mahowald's statement expressed his preference for "male breadwinners." Assuming that Mahowald's statement could be thus construed, Wittenburg's proof of gender discrimination in her termination is lacking.

Fourth, Wittenburg relies on a comment Mahowald made within hours of her termination in which he stated, "Your husband has a job, doesn't he?" In review of summary judgments we accord the nonmoving party all reasonable inferences. Inferring gender basis on this statement alone is not reasonable. In the absence of other proof, Mahowald's question does not show he terminated Wittenburg on the basis of her gender. Mahowald hired the second female analyst, Sandy Hollenhorst, in 2001 and AEFA retained Hollenhorst during the 2002 RIF.

Fifth, Wittenburg cites AEFA's retention of Ramos as the sole technology analyst who is, according to Wittenburg, a "historically lower performing male." Even if Wittenburg did "historically" perform better than Ramos, only the 2002 ratings were used in the 2003 RIF. Wittenburg does not dispute that Ramos's 2002 ratings were better than her ratings. In addition, Ramos was retained over two male technology analysts-Friedrichsen and Lauber.

Finally, Wittenburg points to evidence that AEFA distributed technology duties to two male employees who had little or no technology stock experience after her termination. As we previously noted, it is permissible for an employer, after an RIF, to distribute a terminated employee's duties to retained employees. Therefore, we hold that Wittenburg's gender discrimination claim also fails.[16]

III. *Conclusion*

Accordingly, we affirm the judgment of the district court.

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16. Because the same analysis applies to MHRA claims as Title VII claims, Wittenburg's MHRA gender discrimination claim also fails. *Kasper v. Federated Mut. Ins. Co.*, 425 F.3d 496, 502 (8th Cir.2005).

APPENDIX B — MEMORANDUM OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA FILED SEPTEMBER 19, 2005

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

No. Civ. 04-922 (JNE/SRN)

Bonnie Wittenburg,

Plaintiff,

v.

American Express Financial Advisors, Inc.,

Defendant.

MEMORANDUM

Bonnie Wittenburg brought this action against her former employer, American Express Financial Advisors, Inc. (AEFA), asserting claims of age discrimination under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634 (2000), gender discrimination under Title VII of the Civil Rights Act (Title VII), 42 U.S.C. §§ 2000e to 2000e-17 (2000), and gender and age discrimination under the Minnesota Human Rights Act (MHRA), Minn.Stat. §§ 363A.01-.41 (2004). The case is before the Court on AEFA's motion for summary judgment.[1] For the reasons set forth below, the Court grants AEFA's motion.

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1. At the motion hearing, AEFA moved to strike certain exhibits prepared and submitted by Wittenburg. The Court declines to strike the exhibits at this time, but disregards those portions of the exhibits that are not properly supported.

Appendix B

I. BACKGROUND

AEFA provides financial planning advice, asset management, insurance, and annuities, primarily through a network of financial advisors. AEFA also manages mutual funds. In November 1998, AEFA hired Wittenburg at the age of forty-six. She was hired as an Equity Research Analyst in AEFA's Equity Investment Department (EID) and was assigned to cover stocks in the Technology Sector.[2]

In February 2002, Ted Truscott, AEFA's Chief Investment Officer, began to work on a redesign of the EID. The redesign involved the addition of three portfolio managers hired from a competitor, the creation of a new satellite office, and the merger or movement of certain funds to AEFA's satellite offices. The redesign also included the elimination of analyst positions in Minneapolis. AEFA used a "multiple incumbent process" to determine which analysts to terminate. As part of that process, AEFA ranked each analyst on a talent assessment chart. The rankings were based on several criteria including 1999-2001 performance ratings. The chart was used for a June 2002 reduction-in-force (RIF), in which Wittenburg was retained. In the June 2002 RIF, AEFA considered twenty-four analysts in the EID, fifteen were at least forty-years old and three were women. The RIF resulted in the termination of three analysts; all were men and two were more than forty.

During the summer of 2003, Truscott decided to restructure the Minneapolis office. The restructure allowed portfolio managers to supervise, hire, and recruit analysts to

2. Analysts were assigned to five sectors: Financial, Consumer, Industrial, Health Care, and Technology.

support the funds the portfolio managers oversaw and involved eliminating analysts by sector. AEFA's goal was to maintain sector coverage needed to support the remaining portfolio managers in Minneapolis. In November 2003, the EID was reorganized again, and AEFA decided to retain only one of the four Technology Sector analysts. AEFA again used the multiple incumbent process to determine who among the four analysts would be terminated. AEFA used 2002 performance ratings for the 2003 RIF. Of the four Technology Sector analysts considered for termination, only Dean Ramos (age 40) was retained; Wittenburg (age 51) and two male analysts (ages 41 and 36) were terminated.

On or about January 26, 2004, Wittenburg filed a charge with the Equal Employment Opportunity Commission and received her Notice of Right to Sue on January 30, 2004. She filed suit in this Court on February 13, 2004, alleging that AEFA discriminated and retaliated against her on the basis of her age and gender. AEFA now moves for summary judgment.

II. DISCUSSION

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party "bears the initial responsibility of informing the district court of the basis for its motion," and must identify "those portions of [the record] which it believes demonstrate the absence of a genuine issue

of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party satisfies its burden, Rule 56(e) requires the nonmoving party to respond by submitting evidentiary materials that designate "specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). In determining whether summary judgment is appropriate, a court must look at the record and any inferences to be drawn from it in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

A. Age and gender discrimination claims

1. Wittenburg's prima facie case

The parties agree that the *McDonnell Douglas* analysis applies to Wittenburg's ADEA, Title VII, and MHRA claims. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801-04 (1973) (Title VII); *Chambers v. Metro. Prop. and Cas. Ins. Co.*, 351 F.3d 848, 855 (8th Cir.2003) (ADEA and MHRA). Under *McDonnell Douglas*, Wittenburg must establish a prima facie case of discrimination, at which point AEFA must come forward with a legitimate nondiscriminatory reason for its conduct. *See Chambers*, 351 F.3d at 855. In response, Wittenburg must then demonstrate that the nondiscriminatory reason offered by AEFA was a pretext for discrimination. *Id.*

Wittenburg alleges that AEFA discriminated against her on the basis of age and gender when it terminated her in 2003. This case is properly analyzed as a reduction-in-force (RIF) case. *See Fast v. S. Union Co.*, 149 F.3d 885, 890 (8th

Cir.1998) (noting sufficient personnel changes in department warrants analysis under RIF standard). To establish a prima facie case of age discrimination resulting from a RIF, Wittenburg must show that: (1) she is at least 40 years old; (2) she was qualified for the job; (3) she was discharged; and (4) age was a factor in AEFA's decision to terminate her. *Chambers*, 351 F.3d at 890. To establish a prima facie case of gender discrimination, Wittenburg must demonstrate that: (1) she is a member of a protected class; (2) she was qualified; (3) she was subjected to an adverse employment decision; and (4) some evidence of record supports the inference of gender discrimination. *See McDonnell Douglas*, 411 U.S. 802-04; *Kindred v. Northome/Indus. Sch. Dist. No. 363*, 154 F.3d 801, 803 (8th Cir.1998); *Sigurdson v. Isanti County*, 386 N.W.2d 715, 720 (Minn.1986). Because this case involves a RIF, Wittenburg must make some additional showing that gender was a factor in her termination. *See Hesse v. Avis Rent A Car Sys., Inc.*, 394 F.3d 624, 631 (8th Cir.2005). The Court assumes without deciding that Wittenburg has established a prima facie case of age and gender discrimination.

2. Legitimate nondiscriminatory reason and pretext

AEFA presents legitimate nondiscriminatory reasons for selecting Wittenburg for termination. Namely, AEFA has proffered business and financial reasons for the 2003 RIF. Wittenburg, specifically, was terminated on the basis of a low 2002 performance rating. Therefore, the presumption of discrimination disappears and Wittenburg can avoid summary judgment only if the evidence considered in its entirety creates (1) a fact issue as to whether AEFA's proffered reasons

are pretextual *and* (2) a reasonable inference that age or gender was a determinative factor in AEFA's decision to terminate Wittenburg. *See Kohrt v. MidAmerican Energy Co.*, 364 F.3d 894, 897 (8th Cir.2004); *Mayer v. Nextel W. Corp.*, 318 F.3d 803, 807-08 (8th Cir.2003) (holding that the evidence did not create a reasonable inference of discrimination, despite the fact that plaintiff established a prima facie case and, perhaps, even demonstrated pretext). In short, Wittenburg must demonstrate that AEFA's proffered reasons are a pretext for illegal discrimination. *Kohrt*, 364 F.3d at 898.

Wittenburg asserts that AEFA treated younger male analysts more favorably than older and female employees. First, Wittenburg relies on the fact that AEFA hired Blair Brumley, a 39-year old male analyst, after two older male analysts were terminated in the 2002 RIF. This fact, however, does not demonstrate pretext or lead to a reasonable inference of discrimination. Wittenburg has proffered no evidence that AEFA's decision to hire Brumley was motivated by a discriminatory motive or that it was connected to Wittenburg's termination in 2003.

Second, Wittenburg claims that one can infer an improper motive because Dean Ramos (age 40) was retained during the 2003 RIF even though his 2003 performance ratings and tenure average were weaker than Wittenburg's. This evidence does not support an inference of discrimination because AEFA did not use analysts' 2003 ratings or tenure averages to determine terminations in 2003. Instead, there is no dispute that AEFA used analysts' 2002 ratings to determine who would be terminated in the 2003 RIF. Further, there is no

dispute that Ramos's 2002 ratings were better than Wittenburg's.

Third, Wittenburg argues that discrimination can be inferred because AEFA assigned two male analysts from another sector (ages 45 and 49) to work on technology stocks after Wittenburg was terminated and because AEFA posted job listings for "multi-sector" coverage after the 2003 RIF. The absorption of work by other analysts, however, does not create an inference of age or gender discrimination simply because the analysts were male and younger than Wittenburg. *See Frieze v. Boatmen's Bank of Belton,* 950 F.2d 538, 540-41 (8th Cir.1991). In the context of a RIF, employers often distribute work to other employees performing related work for legitimate reasons. *Id.* at 541. Moreover, the age differential between these two employees (ages 49 and 45) and Wittenburg (age 51) is insufficient to create a reasonable inference of age discrimination. *See Schiltz v. Burlington N. R.R.,* 115 F.3d 1407, 1412-13 (8th Cir.1997) (finding a five-year age disparity between plaintiff and individual hired after plaintiff's termination insufficient to raise an inference of discrimination at the prima facie stage). As to the "multi-sector" job posting, Wittenburg has made no showing that the job was the same as hers and therefore its posting does not support an inference of discrimination.

Fourth, Wittenburg argues that the talent assessment chart created in 2002 favored younger male analysts and set up older and female analysts for termination in the 2003 RIF. Specifically, Wittenburg contends that in 2002, AEFA decision-makers, including Mahowald, developed a talent assessment chart for analysts and that AEFA and Mahowald

knew in 2002 that the assessment would be used to determine terminations for the 2003 RIF. Wittenburg further asserts that Mahowald made negative comments about her performance that were inconsistent with her previous performance ratings and that she should have received a higher assessment. Wittenburg also asserts that older and female analysts that were placed low on the chart later received low 2002 performance ratings from Mahowald, which set them up for termination in 2003. After reviewing the record, the Court concludes that Wittenburg's allegations with respect to AEFA's motivation behind its talent assessment are unsubstantiated and speculative. The record is devoid of any support for Wittenburg's assertion that gender and age were motivating factors in AEFA's talent assessment chart. In addition, the record reveals that the talent assessment chart was used only for the 2002 RIF. There is no evidence connecting the chart to Wittenburg's termination in 2003. Therefore, evidence related to AEFA's use of the talent assessment chart does not permit a reasonable inference of discrimination. Nor does it support a finding of pretext.

Finally, Wittenburg argues that performance reviews were biased in favor of younger male analysts because they received undeserved 2002 performance ratings while she was not properly credited for her accomplishments. Although the record does show that Wittenburg believes she should have received higher 2002 scores and that some younger male analysts' evaluations were unwarranted, Wittenburg fails to put forth evidence that Mahowald or anyone at AEFA manipulated her ratings to set her up for termination because of gender or age. Instead, Wittenburg relies on her own speculative analysis of how AEFA should have rated its

employees and irrelevant evidence attesting to her qualifications as an analyst. For example, Wittenburg points to evidence that she performed well in 2003 and that Starmine, an independent financial industry service, rated her well. However, it is undisputed that AEFA used 2002 performance reviews for the 2003 RIF. There is no evidence that AEFA relied on Starmine to make 2003 RIF decisions. In addition, there is no evidence that AEFA chose to use the 2002 data to predetermine a biased outcome. *Cf. Evers v. Alliant Techsystems, Inc.*, 241 F.3d 948, 959 (8th Cir.2001) (explaining that there is nothing inherently discriminatory about choosing to rely on recent performance more heavily than past performance). Therefore, Wittenburg's 2003 performance reviews and Starmine ratings are not relevant.[3] Wittenburg also asserts that Mahowald used subjective components in reviewing analysts' performance and inappropriately raised and lowered scores to the detriment of older workers. However, there is no evidence that Mahowald manipulated scores to achieve a biased outcome. Moreover, "the presence of subjectivity in employee evaluations is itself not a grounds for challenging those evaluations as discriminatory." *Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 780 (8th Cir.1995).

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3. The Court will not examine the propriety of AEFA's decision to use 2002 performance reviews in the 2003 RIF. *See Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 780-81 (8th Cir.1995) (noting that discrimination laws do not give courts authority to act as super-personnel departments); *see also Regel v. K-Mart Corp.*, 190 F.3d 876, 880 (8th Cir.1999) (explaining that a company's exercise of its business judgment is not a proper subject for judicial oversight).

Appendix B

Wittenburg also relies on several comments made by AEFA employees. The Court assumes that these statements were made for purposes of this motion. *See* Fed.R.Civ.P. 56. The Court first turns to comments made before Wittenburg's termination in 2003. The first statement occurred sometime in 1999. Kay Doremus, a female analyst at AEFA, was placed on probation and sought advice from her colleague, Thomas Mahowald. During a conversation, Mahowald allegedly agreed with the proposition that AEFA tended to terminate one person per year and stated: "[Y]ou have to make concessions because a lot of these guys are the sole support for their families." This comment was made nearly four years before the 2003 RIF. Therefore, it lacks any temporal connection to Wittenburg's termination. More importantly, there is no evidence that this comment was in any way related to Wittenburg. Finally, there is no evidence that Mahowald, at the time, had any decision-making authority over Wittenburg or was making any decisions with respect to the hiring or firing of analysts. Indeed, Wittenburg asserts that Mahowald was hired to run the Equity Research Department in late 2001, and she has proffered no evidence that, in 1999, he was doing anything other than expressing his opinion as an analyst. The Eighth Circuit has ruled that at the pretext stage, "some causal relationship is necessary to demonstrate the significance of non-contemporaneous statements, or statements made by persons other than the relevant decision maker, to the resolution of the ultimate issue of intentional discrimination." *Hutson*, 63 F.3d at 779. Because Wittenburg has failed to proffer any facts demonstrating a causal relationship, the Court concludes that this comment cannot, as a matter of law, support a reasonable inference that Wittenburg was terminated because of her age or gender. *See id.*

Appendix B

The second comment occurred after the 2002 RIF, when Mahowald, then the head of the Equity Research Department, hired a 39-year old male, Brumley, as an analyst. Wittenburg contends that Mahowald told her that he was going to hire Brumley because he had been unemployed and that Mahowald "also talked about Blair's family." Wittenburg contends that this comment demonstrates that Brumley received favorable treatment because he was a man. Mahowald's comment, however, fails to demonstrate pretext or raise an inference of discrimination. Although this comment was made while Mahowald was the head of the Equity Research Department, this comment lacks any causal connection to Wittenburg's termination. In addition, to infer discriminatory motive from this statement requires the resort to speculation. *See Frieze,* 950 F.2d at 541 (noting that an inference is reasonable only if it can be drawn from the evidence without speculation). Even though Wittenburg argues that Mahowald, in speaking about Brumley's family, was expressing a preference for "male breadwinners," Wittenburg has not submitted evidence indicating exactly what Mahowald said about Brumley's family or that he expressed a preference for hiring men.

The third comment appeared in a 2002 news article about AEFA's hiring of several portfolio managers from Fidelity Investments. Truscott is quoted as saying: "We need to be as competitive as the best fund families out there. . . . We will hire talent where we feel we have gaps. That said, we are not adverse to hiring younger portfolio managers or analysts and growing them." This comment also fails to demonstrate pretext or to create a reasonable inference of discrimination. The comment was made after AEFA hired three portfolio

managers from another firm and explains that AEFA is willing to hire younger managers and analysts. No reasonable fact finder could conclude that this comment expresses a preference for young male analysts. Moreover, there is no indication that this comment was connected to Wittenburg's termination.

The fourth comment on which Wittenburg relies involves a hand-written note made in 2002 by Judith Forker, AEFA's Vice President Human Resources Relationship Leader. Forker wrote on a 2002 organization chart "maybe add a jr. person" next to the Finance Sector Team. Forker's handwritten comment is also insufficient to demonstrate pretext or to create an inference of discrimination. Again, there is no indication that this comment demonstrates a preference on the part of AEFA for younger, male analysts. Wittenburg has not proffered any evidence to explain what Forker meant by her notation. Moreover, there is no evidence that this notation, which was written next to the Finance Sector Team, was in any way related to the elimination of Wittenburg's position, which was in the Technology Sector.

The fifth comment was made by Dan Rivera in 2002. Wittenburg asserts that Rivera was the Head of Equities at that time. Rivera allegedly told Al Henderson, a 62-year old former portfolio manager, that he was terminated in the 2002 RIF as part of a decision to "retain those that were younger" because they had "more years of service ahead of them." While the record shows that Rivera was part of the redesign process of the EID in 2002, Wittenburg has not proffered evidence that he was a decision-maker with respect to the 2003 RIF. Moreover, Wittenburg has not presented evidence

that Rivera made any decision that negatively impacted her.[4] Accordingly, Rivera's comments do not demonstrate pretext or support an inference of discrimination. *See Hitt v. Harsco Corp.*, 356 F.3d 920, 925 (8th Cir.2004) (noting that remarks about age may establish pretext under some circumstances, but not when the remark was made by a non-decision-maker); *Frieze,* 950 F.2d at 541 (finding that ageist comments by persons who did not take part in decision to discharge plaintiff did not create a reasonable inference of discrimination). Even if Rivera's remarks are viewed as evidence of *his* motive to discharge Henderson, the remarks do not support an inference that AEFA's ultimate decision, which was not made by Rivera, to terminate Wittenburg was motivated by age. *See Hitt,* 356 F.3d at 925.

Wittenburg also relies on two comments made close to the time of her termination. First, Wittenburg argues that shortly after her termination Thomas Mahowald stated to her: "Your husband has a job doesn't he?" This statement, however, is too vague to establish pretext or to create a reasonable inference of discrimination. The Court acknowledges that Wittenburg is entitled to the benefit of all

4. The record reveals that Rivera, among others, was involved in the determination of how many analysts to retain in the 2002 RIF, but that he was not involved in a similar determination with respect to the 2003 RIF. In particular, Rivera was involved in the development of the 2002 talent assessment chart. Wittenburg has not, however, proffered evidence that this chart was used in the 2003 RIF. Nor did she proffer evidence that Rivera made any decisions that impacted her 2002 performance ratings, which were the basis for her termination. Indeed, Wittenburg asserts that Mahowald and Truscott were the actual decision-makers who allegedly manipulated and had the final say on her 2002 ratings.

reasonable inferences, but an inference is only reasonable if it can be drawn from the evidence without speculation. *See Frieze*, 950 F.2d at 541. No reasonable fact finder could conclude that this vague question demonstrates that Mahowald terminated her based on her gender or age.

Second, Wittenburg relies on comments made by Mike Kennedy, a portfolio manager, during a job interview after Wittenburg's termination. During the conversation, Wittenburg claims that Kennedy advised her that she should start looking for another job if he hired her, due to "the secrecy that had come to permeate AEFA under Truscott, and due to management's lack of respect for people." Kennedy also allegedly stated that two employees "did not want to retire now." Wittenburg believed that he meant older employees were unfavorably targeted. The Court concludes that Kennedy's comments cannot be interpreted as demonstrating discriminatory animus on the part of AEFA. Wittenburg's interpretation requires too great of an inferential leap. Kennedy's comments, on their face, appear to express a concern with a general lack of respect and secrecy, but nothing in his comments indicates bias against Wittenburg on the part of AEFA.[5]

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5. Wittenburg also asserts that discriminatory motive can be inferred because Kennedy ultimately hired a 39-year old male analyst. This inference is unreasonable. There is no evidence that Wittenburg was more qualified than the man hired and admits that during the interview she stated that she "wasn't necessarily comfortable with working with other people in the organization." Moreover, the position was initially offered to a woman, who did not accept.

Appendix B

Having addressed the comments made by AEFA employees, the Court turns to Wittenburg's remaining arguments on pretext. First, Wittenburg argues that AEFA failed to follow policy because Mahowald did not provide Wittenburg with a copy of her 2002 performance review and simply told her of the scores she would receive. There has been no showing that Mahowald's failure to give Wittenburg a written review would have had a material effect on her rating, which led to her termination. Moreover, there is no evidence in the record that Mahowald gave any other employee a written copy of a 2002 performance review.

Second, she argues that the committee at AEFA charged with ensuring that the rating process was non-discriminatory failed to do so by generally endorsing Mahowald's performance rating recommendations and engaging in discrimination itself. However, other than submitting evidence that the committee agreed with Mahowald's 2002 rating, Wittenburg has produced no evidence indicating discriminatory motive or bias.

Third, Wittenburg argues that AEFA's selection process was manipulated for a biased outcome. In support, Wittenburg argues that while AEFA claims that it used "current performance ratings" of individuals to determine whom to terminate during the 2003 RIF, it ignored performance data of 2003. Again, that AEFA used 2002 ratings to determine whom to terminate does not demonstrate bias. Indeed, the record indicates that only 2002 ratings were available at the time of the 2003 RIF and that all employees were evaluated based on these ratings. While it is clear that Wittenburg feels she would have fared better had AEFA used

different criteria in the RIF, there is no evidence that AEFA chose to use 2002 data to predetermine a biased outcome. *Cf. Evers*, 241 F.3d at 959.

Fourth, Wittenburg argues that AEFA categorized its analysts differently in the 2002 and 2003 RIFs, thereby allowing AEFA to terminate older and female analysts. Specifically, Wittenburg asserts that in its review for termination, AEFA categorized its analysts by "pool" in 2002 and "sector" in 2003 so it could bias the outcome of the RIF. AEFA argues that it had a business reason to analyze its analysts by sector for the 2003 RIF, namely because it had changed its research structure between 2002 and 2003. After a thorough review of the record, the Court is unable to find evidence supporting Wittenburg's claim. Instead, it appears that while Wittenburg is critical of the RIF process in general, AEFA's decision to categorize analysts by "sector" in 2003 does not demonstrate pretext or create a reasonable inference of discrimination.

Viewing the record in the light most favorable to Wittenburg, no reasonable fact finder could conclude that AEFA's proffered reasons for terminating Wittenburg are pretextual. In addition, the record does not permit a reasonable inference that age or gender actually motivated AEFA's decision to terminate Wittenburg. The Court therefore grants AEFA's motion for summary judgment insofar as it relates to Wittenburg's age and gender discrimination claims.

Appendix B

B. Retaliation

Wittenburg also argues that AEFA retaliated against her for filing a discrimination complaint by reducing the amount of her 2003 bonus. To establish a prima facie case of retaliation, Wittenburg must show: (1) a charge of discrimination was filed; (2) AEFA took adverse action; and (3) the adverse action was linked to the filing of the discrimination charge. *See Evans v. T.W. Servs., Inc. of Del.*, 930 F.2d 612, 614 (8th Cir.1991). If Wittenburg establishes her prima facie case, then AEFA must articulate a legitimate nondiscriminatory reason for its action. Wittenburg must then show that AEFA's proffered reason is pretextual and that her filing a discrimination charge was the real reason for AEFA's action. *See Jackson v. Delta Special Sch. Dist., No. 2,* 86 F.3d 1489, 1494 (8th Cir.1996).

Wittenburg argues that AEFA retaliated against her because it gave her a bonus that was less than the bonuses she received in previous years and less than the amount she claims she should have received. Wittenburg argues further that retaliatory intent, and therefore a causal connection, is demonstrated by the facts that AEFA did not initially agree to pay her a 2003 bonus, that AEFA labeled her bonus check "litigation settlement," and that AEFA allegedly gave her an undeserved low score on her 2003 review after it had learned of her legal claims. The Court assumes without deciding that Wittenburg can establish a prima facie case of retaliation.

AEFA has articulated a legitimate nondiscriminatory reason for the alleged adverse action. First, AEFA asserts that Wittenburg's bonus was determined in the same manner

as all other analysts and in accordance with its compensation plan. AEFA also contends that poor fund performance in 2002 and a change in the method of calculating bonuses in 2003 resulted in a smaller bonus pool in Minneapolis. AEFA asserts that many Minneapolis analysts received lower bonuses in 2003 as a result of the smaller bonus pool. Although Wittenburg questions the calculations used to determine, and the amount of, her bonus, she has not offered evidence demonstrating that AEFA's reasons are pretextual and that her bonus was lowered because she filed a discrimination charge. The Court therefore grants AEFA's motion for summary judgment insofar as it relates to Wittenburg's retaliation claims.

III. CONCLUSION

For the reasons stated above, the Court grants AEFA's motion for summary judgment. The Court will issue an Order consistent with this Memorandum separately.

Dated: September 19, 2005

s/ Joan N. Ericksen
JOAN N. ERICKSEN
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DENYING PETITION FOR REHEARING FILED NOVEMBER 16, 2006

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 05-4038

Bonnie Wittenburg,

Appellant,

v.

American Express Financial Advisors, Inc.,

Appellee.

Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. Judge Riley did not participate in the consideration or decision of this matter.

November 16, 2006